

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT NO. 57

HON. PAUL G. BRECKENRIDGE, JR., JUDGE

4
5 CHURCH OF SCIENTOLOGY OF
6 CALIFORNIA,

7 Plaintiffs,

8 vs.

NO. C 420153

9 GERALD ARMSTRONG,

10 Defendant.

11 MARY SUE HUBBARD,

12 Intervenor.

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15 REPORTERS' DAILY TRANSCRIPT

16 Friday, April 20, 1984

17 VOLUME 1

18 Pages 200 through 327, incl.

19
20 APPEARANCES:

(See next page.)

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NANCY L. HARRIS, CSR #644
DIANA R. GRACE, CSR #1672
Official Reporters

APPEARANCES:

**For the Plaintiff
and Intervenor:**

**LITT & STORMER
BY: BARRETT S. LITT
Paramount Plaza
3550 Wilshire Boulevard
Suite 1200
Los Angeles, California 90010
(213) 386-4303**

-and-

**BARRETT S. LITT
BY: MICHAEL S. MAGNUSON
The Oviatt Building
617 South Olive Street
Suite 1000
Los Angeles, California 90014
(213) 623-7511**

**For the Plaintiff
Only:**

**PETERSON & BRYNAN
BY: JOHN G. PETERSON
8530 Wilshire Boulevard
Suite 407
Beverly Hills, California 90211
(213) 659-9965**

For the Defendant:

**CONTOS & BUNCH
BY: MICHAEL J. FLYNN and
JULIA DRAGOJEVIC
5855 Topanga Canyon Boulevard
Suite 400
Woodland Hills, California 91367
(213) 716-9400**

1 LOS ANGELES, CALIFORNIA, FRIDAY, APRIL 20, 1984, 9:08 A.M.

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4 THE COURT: All right, let's see. The next motion
5 is, I think, motion in limine on the subject matter of
6 admissible evidence and testimony of various witnesses;
7 is that what you next have suggested?

8 MR. LITT: Yes, your Honor.

9 THE COURT: Bear with me. Everything is sort of ---
10 I have got it.

11 I gather the first item is evidence relating
12 to "shedding, destruction of, vetting" -- v-e-t-t-i-n-g --
13 "of documents allegedly carried out by members of the Church
14 of Scientology.

15 MR. LITT: Yes, that is correct, your Honor.

16 THE COURT: All right, do you want to address that?
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1 MR. LITT: Yes, Your Honor.

2 I have a suggestion -- I don't know whether the
3 court will want to follow it or not -- about how to do this.

4 We have set out in our motion the areas which
5 we determined, as best we could from the discovery in the
6 case and the pleadings in the case, that we felt should not
7 be admitted; and I think it might be easier if the defense
8 explained why these various areas were relevant and we respond,
9 since really to some extent we are striking blind because
10 we are not exactly sure what it is or what their theories
11 are. We made our best estimate here.

12 But it seems to me it would perhaps be more
13 expeditious to have a reversal of the order because I will
14 argue and Mr. Flynn will argue, and I will want to respond
15 to the actual theories he puts forward rather than with respect
16 to what our guess is.

17 THE COURT: All right.

18 Do you want to offer any argument relating to
19 this subject, Mr. Flynn?

20 MR. FLYNN: I do, Your Honor.

21 I think I am the one now being placed in the
22 position of being a little blind because we both have the
23 advantage of each other's briefs; but I don't really know
24 what their position, in terms of oral argument, is before
25 the court.

26 But basically our position is this: There are
27 all those categories which are set forth in their motion.
28 With regard to the shredding of all the 14 or 15 categories --

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1 of all the 14 or 15 categories, we think several are moot.
2 We don't intend to offer any evidence on some of them; but
3 the most important one, we think, is the shredding one.
4 The shredding and the Fair Game Doctrine are the two most
5 important.

6 But the shredding issue is probably the most
7 important because, one, it explains the circumstances under
8 which Armstrong came into possession. On the conversion
9 count what the plaintiff and the intervenor would have the
10 court or the jury believe is that he, all of a sudden, had
11 these documents dumped into his hands and then gave them
12 to Mr. Garrison without any real explanation of the
13 circumstances under which they came into his hands. We think
14 that is very important because it relates to the possessory
15 interests that he had and the possessory interests thereafter
16 that Garrison had, particularly when you get into the
17 particularization of the documents because, as I indicated
18 to the court yesterday, I don't believe that anyone, in all
19 candor, knows what is in those documents, probably, other
20 than Garrison and Armstrong. And without the court or the
21 jury understanding exactly how that occurred, we think we
22 would be deprived of the most essential defense that we have
23 with regard to the possessory rights of Garrison and Armstrong.

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1 Secondly, the issue of Mr. Armstrong and
2 S.P. Declare, having been accused of stealing the documents,
3 and I am not sure the court has seen the copy of the Declare
4 yet, but it is in the record, in addition to being accused
5 of stealing them, he was accused of making false statements
6 about Mr. Hubbard, and that is right in this S.P. Declare.

7 He was then placed in the position of having
8 to prove that what he said, particularly where he thought
9 that there was going to be a pending lawsuit against him,
10 of having to prove what he said about Hubbard was true.
11 If the circumstances under which he came into possession
12 of the documents was not allowed into evidence, then his
13 state of mind with regard to his belief that the plaintiff
14 and the intervenor would destroy the documents and destroy
15 the evidence of what the truthfulness of his statements
16 were, then again he would be deprived of one of his funda-
17 mental defenses.

18 Lastly on the issue of credibility, we believe
19 that evidence that a party intends to destroy evidence
20 is specifically relevant to the question of credibility,
21 particularly where this, and this intervenor for a period
22 of five years had been destroying evidence in connection
23 with numerous civil and criminal cases pending across the
24 United States. This is particularly relevant based on
25 the Smith case which has recently been decided in California
26 on the spoliation of evidence.

27 So, these three items, we think, justify this
28 particular piece of evidence coming in. In fact, of all

1 the evidence that we intend to introduce, my personal
2 conviction is that the most important piece of evidence
3 is the shredding evidence because it explains to the court
4 and to the jury what the whole case is about, that he
5 obtained possession of documents. The documents had certain
6 types of information in them. He gave them to Garrison.
7 When the organization discovered what type of information
8 was in them, they refused to conform to the truth.

9 They then attacked him and then sought to get
10 the evidence back for the purposes of destruction, and
11 they have a history of destroying the documents. So, for
12 those reasons we think it should come in.

13 Lastly, there is the issue of value and damages.
14 If the evidence is that the documents were going to be
15 destroyed, then the issue that has to be raised for the
16 last year and a half in the mounds of paper that have been
17 filed that these documents have intrinsic value of millions
18 of dollars because they are the memorabilia of their founder,
19 then that evidence would clearly be disputed by the fact
20 that they are about to destroy it, number one, and number
21 two, as the court is going to hear, the only person who
22 stood between the destruction of these documents and the
23 shredder itself was Gerald Armstrong.

24 The documents were brought to him. It was
25 his decision to make. He brought them to Laurel Sullivan
26 and they were preserved, but at that critical instant in
27 time, which is the focus of the circumstances under which
28 Armstrong came into possession, at that critical instance

1 the sole discretion to destroy or keep these documents
2 was left in the hands of Gerald Armstrong.

3 If the plaintiff, the intervenor, and Mr. Hubbard,
4 the absent party here, really thought the documents had
5 value, then they wouldn't have left Mr. Armstrong with
6 the sole discretion as to whether to destroy them or not.
7 So, on the issue of damages we think it is also relevant.

8 THE COURT: All right, Mr. Litt, what is your position?

9 MR. LITT: Your Honor, let me start out explaining
10 some circumstances and again I will because there are
11 disputed facts on some things, for purposes of what I say,
12 I will rely only on what Mr. Armstrong has said so that
13 I am not dealing in an area where there are factual disputes.

14 Mr. Armstrong claims that there was a shredding
15 of documents, not these documents, that occurred in January
16 of 1980. Mr. Armstrong may contend it was to hide evidence.
17 If we have to get into it, we will establish that that
18 is simply false, but I won't address that at this point.
19 These were not the documents that we are talking about.

20 What Mr. Armstrong says occurred is that while
21 this was going on, a box from an area called "Our Storage"
22 which had Mr. Hubbard's personal possessions, furniture,
23 a variety of materials, a woman came up to him and said,
24 "What should happen to these?"; a single box containing
25 a small number of materials.

26 Mr. Armstrong took the box, took them to his
27 organizational senior, said, "What should happen to these?"

28 The decision was clearly they should be saved.

1 One, they are L. Ron Hubbard's materials and should not
2 be destroyed.

3 Two, they are of value and should not be destroyed,
4 and then, your Honor, Mr. Armstrong petitioned to obtain
5 a post to take that box, but not just that box because
6 we are talking about a single box that he testifies about,
7 but some 25 other boxes that he had never been asked about
8 what to do with, and that is the basis of his archives,
9 but that is only the beginning, your Honor.

10 For the next 22 months his job is to collect
11 up these materials in an archives. There are, your Honor,
12 some 4,000 pages of original materials. Those original
13 materials were in Mr. Hubbard's archives that Mr. Armstrong
14 obtained in September of 1981, 18 months after this purported
15 shredding, and Mr. Flynn says these documents were saved
16 by Mr. Armstrong from the shredder in January 1980. It
17 is a complete distortion of Mr. Armstrong's own testimony.
18 He says one box.

19 Your Honor, there are tens and tens of thousands
20 of pages that were in the archives. Mr. Armstrong only
21 took a small percentage of what the total archives are
22 and those amount to not one box but approximately in terms
23 of the size of the box that he found, 17 times that amount,
24 just what was given, not what was in the archives because
25 that would be 100 times the amount.
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1 So that on the first issue, whether or not there
2 is any basis in the record to contend that Mr. Armstrong
3 saved these documents -- and when I say "these," I mean the
4 archives in total or what was under seal. I don't believe
5 that anything that was under seal was in that box at all;
6 if so, a very small part of it. The materials regarding
7 Mrs. Hubbard that came from her archives were not.
8 Mr. Armstrong never even saw those until, literally, a year
9 and a half later so that it cannot explain the circumstances
10 of his possession of these archives documents because the
11 two are completely independent.

12 There is no rational relationship between the
13 fact that one set of documents, assuming Mr. Armstrong's
14 version, was being destroyed and the fact that this other
15 set of documents was saved. That was his job. That is his
16 testimony. It was his job to preserve them. He was assigned
17 that position. He was paid by the church to preserve them.
18 He obtained money from the church, Your Honor, to go and
19 purchase materials. We have purchase orders where he was
20 given money to go and buy materials that were put into the
21 archives.

22 So that on the first theory, which is that this
23 somehow goes to a right of possession, it simply -- it is
24 completely irrational. There is no basis on which one can
25 argue that what happened with that box provides a basis for
26 saying that he saved these materials, and he has never
27 contended that they were his. He never contended that because
28 he, quote, saved them that they became his. In deposition

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1 he said the materials are Mr. Hubbard's, Mrs. Hubbard's and
2 some Scientology organizations. That is a quote from
3 Mr. Armstrong.

4 Now, Mr. Flynn then slides into this Declare;
5 and I suppose I may have to begin to get into the issue now
6 because he asserts that.

7 THE COURT: We are not trying the case, counsel. It
8 is just to determine whether or not there is some basis for
9 receiving this evidence --

10 MR. LITT: I understand.

11 THE COURT: -- and whether that is outweighed by any
12 prejudicial effect.

13 MR. LITT: I understand that, Your Honor. But the
14 first basis is: Mr. Flynn makes statements that are not
15 supported by the record and the testimony of his defendant;
16 and, therefore, the reason I spell out those facts is because
17 when the facts, as he testifies to them, are known, there
18 is no rational basis. There is no reasonable relationship
19 to anything that is relevant; because given his own testimony,
20 this is not relevant.

21 Then he argues that somehow what was stated in
22 this Declare -- this takes us directly back into the First
23 Amendment issue in the case. A Declare, Your Honor, is an
24 internal excommunication notice within Scientology; it is
25 nothing else.

26 There is an internal procedure by which a person
27 who is declared can challenge that Declare or can get back
28 into good standing with the church. It is a statement that

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1 you are excommunicated from the church. It refers to
2 Scientology crimes, not civil crimes. That is the basis
3 of it.

4 Mr. Flynn says that in this Declare, in this
5 internal document, that Mr. Armstrong was placed in the
6 position of having to prove that what he said about Mr. Hubbard
7 was true and that somehow, therefore, shredding of documents
8 can come in. The Declare has nothing to do with that. It
9 is not justiciable. It is an internal church affair. It
10 cannot be intruded into by the court. That is point one.

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11 But point two, it is not an accusation in any
12 court. Declares are issued commonly, including to people,
13 by the way, Your Honor, who remain in the church. It is
14 not exclusively for people who leave the church. It has
15 to do with internal systems and procedures, so that there
16 cannot --

17 First of all, the court cannot allow the testimony
18 about the Declare to come in under the First Amendment.
19 But, secondly, it has nothing to do with anything; and what
20 is going on is: Once again the defendant is putting forward
21 theories; and if these generalized claims of destruction
22 of evidence, which are not supported by the record in this
23 case about these documents, are permitted to come in, the
24 prejudicial effect is obvious. The relevance, if it has
25 any, is extremely remote, given Mr. Armstrong's own testimony;
26 and there is no -- there is no evidence that a person can
27 rationally conclude that there was any intention to destroy
28 these documents.

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1 THE COURT: It seems to me that is a question for the
2 jury to decide, counsel. You are raising a number of points
3 which go to the ultimate issues in this case, but I am not
4 dealing with the ultimate issues. We are dealing with whether
5 or not evidence should be received. And it seems to me he
6 has a right to explain why he did what he did, when he did;
7 and it is for the jury to determine whether that is truthful
8 or not.

9 If this is part and parcel of his justification --
10 and apparently there is documentation from other cases that
11 there was, at different places, different times, shredding,
12 that is apparently not a secret and that has been judicially
13 established, I gather. It seems to me --

14 MR. LITT: I don't know that that is judicially
15 established.

16 THE COURT: Pardon?

17 MR. LITT: I am not aware that that has been judicially
18 established.

19 THE COURT: Maybe it hasn't, but I had a feeling I
20 had read somewhere there was some evidence of that that had
21 been referred to in some of the cases that have been published,
22 various decisions in the United States over the last 20 years
23 dealing with the Church. And it seems to me that he is
24 entitled to present this, and it seems to me if it is a
25 substantial basis for his justification then it is something
26 he is entitled to present. And if it isn't true, if it can
27 be established it isn't true, then that is for the jury to
28 determine.

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1 MR. LITT: Your Honor, the point is that they are going
2 to introduce evidence about other shredding activity which
3 will prejudice the jury, which has nothing to do with these
4 documents. That is why it can't come in. That is why I
5 have to explain the circumstances. Its prejudicial effect --
6 the real purpose is to say, "These people would destroy
7 anything," not these documents; because there is no evidence
8 that a single document was ever destroyed of these archives
9 or anything that Mr. Armstrong took.

10 THE COURT: I got the impression that there was an
11 operation going on out there at the Springs and that things
12 were being shredded and that he came across this box and
13 inquired as to whether or not it was something -- what should
14 be done with it, and he was advised that apparently it should
15 not be destroyed. So it seems to me you have relied upon
16 that in some of your statements, I believe, or briefs, that
17 this is how the whole thing originated. And it seems to
18 me that that is part and parcel of this case; and whether
19 it is true, that is for the jury to decide. I think that
20 we can --

21 MR. LITT: Your Honor, they intend not only to introduce
22 evidence of how Mr. Armstrong came into possession of this
23 box, they intend to introduce testimony from people talking
24 about a variety of shredding activity.

25 Mr. Flynn said it yesterday, "This was the fourth,"
26 according to him, "of some series of activities."

27 Are we going to get into all of those?

28 THE COURT: Well, I don't know.

1 What do you have in mind in that respect?

2 MR. FLYNN: Your Honor, what I have in mind is just
3 this one shredding operation; and if evidence is introduced
4 to try to rebut that, then I think I could then introduce
5 evidence to show a pattern of conduct. But, in any event,
6 all I intend to introduce right now is the circumstances
7 surrounding how this box came into Mr. Armstrong's possession.

5
1 THE COURT: Well, his state of mind with respect
2 to, I assume, what might happen to it if it were returned
3 to the church.

4 MR. FLYNN: Exactly, your Honor.

5 MR. LITT: I just want to make clear that it is our
6 position that his state of mind is not an element of any
7 of the torts in this case, and if I understand the court
8 correctly, it is basically on the theory of this justifi-
9 cation defense that the court referred to yesterday that
10 it is being found to be relevant. I just want to understand --

11 THE COURT: Well, you are understanding it correctly.

12 Well, I can give a limiting instruction that
13 they are not to consider it for any other purpose unless
14 the court instructs them to the contrary.

15 I will deny the motion except that it will
16 be received for the limited purposes as we have indicated
17 and in dealing with this one situation out there at
18 Gilman Springs, and that the defense will not be permitted
19 to go into other shredding operations without first bringing
20 it to the attention of the court outside the presence of
21 the jury so that the matter can be thoroughly argued by
22 both sides.

23 Number two is the suggestion that Mrs. Hubbard
24 and Mr. Hubbard are not legally married. Do you have any
25 intention to get into that, counsel?

26 MR. FLYNN: No, your Honor.

27 MR. LITT: Let me raise a question about that. He
28 says in his response that he doesn't intend to get into that.

1 He does intend apparently to make the contention or to
2 try to introduce into evidence a marital agreement signed
3 in, I believe, 1952, 31 years ago between Mr. and Mrs. Hubbard,
4 which, according to the characterization, says that either
5 side will grant a divorce to the other without a property
6 claim if either side desires, which has never occurred.

7 He does say he intends to get into that to
8 argue that she has no right to the joint property of her
9 and her husband.

10 THE COURT: I don't see what that's got to do with
11 whether or not they are legally married. We can talk about
12 some other points on that subject.

13 He says he is not going to present anything
14 that they are not legally married, so that motion is granted.
15 There will be no evidence or no suggestion that the parties
16 are not legally married.

17 MR. LITT: What I am reading, your Honor, is that
18 when we wrote this, we did the best we could as to what
19 the type of evidence was. They have stated what evidence
20 in this regard --

21 THE COURT: Well, we can deal with that as an additional
22 item if you want to. Let's just deal with what you have
23 got here first.

24 MR. LITT: Okay.

25 THE COURT: Three, the fact that defendant Armstrong
26 has filed a cross-complaint against the Church of Scientology
27 of California and other parties with the allegations on
28 which the cross-complaint is based.

1 Do you have any intention of getting into that?

2 MR. FLYNN: We don't intend to introduce it, your
3 Honor.

4 In your Honor's initial statement to the jury
5 as to what the case is about, we think that your Honor
6 should explain that there is a cross-complaint that they
7 are not hearing. But in terms of putting it into evidence,
8 we don't intend to.

9 MR. LITT: The existence of a cross-complaint has
10 no relevance either in any indications from the court or
11 in evidence in the case. I don't understand what -- the
12 effect of the court saying that there is a cross-complaint
13 is to give more weight to it than if Mr. Flynn were to
14 say it.

15 THE COURT: Well, it seems to me it has no relevancy
16 except it might show some bias on the part of the defendant
17 and I would think the plaintiff might want to get into
18 that, but if he is not getting into it, I don't see any
19 reason to deal with it so I will make the order that there
20 is to be no reference to the cross-complaint and with all
21 of these things where I am making an order prohibiting
22 something, it is always subject to the proviso that if
23 something else develops that makes something rational or
24 reasonable or relevant, it can be brought to the attention
25 of the court outside the presence of the jury. We will
26 discuss it and the court would be willing to reconsider
27 the position. This is a starting point.

28 Four, any alleged misrepresentations to fraudulent

1 practices committed by L. Ron Hubbard, Mary Sue Hubbard
2 or the Church of Scientology or any scientology organizations
3 or any individual acting on behalf of any such organizations.

4 ^{FLYNN:} MR. LITT: Well, your Honor, I thought -- I think
5 that was extensively discussed yesterday. That is what
6 the case is about in terms of not only Mr. Armstrong's
7 state of mind but on all of the issues, virtually every
8 issue in the lawsuit and every count as to why he did what
9 he did.

10 For example, if the invasion of privacy count
11 and the breach of fiduciary duty counts are tried, then
12 the upshot, the result of trying those issues is to go
13 into those facts. It isn't that we are intentionally trying
14 to put fraud or misrepresentation before the jury, but
15 in putting before the jury the issues of public figure
16 and what public interest is involved and whether or not
17 over a period of years certain statements were made about
18 Hubbard, and how the documents relate to the public interest
19 and public figure issues of what was said about Hubbard
20 in the context of these documents, the documents, as I
21 have indicated from the outset to the court, are going
22 to disprove what the public statements have been about
23 Mr. Hubbard. That is the essence of the entire case.

24 In terms of trying to prove that L. Ron Hubbard
25 and Mary Sue Hubbard or the Church of Scientology of California
26 are frauds or involved in fraudulent activities, that is
27 not the purpose of the introduction of the evidence. The
28 outcome of the introduction of the evidence, because it

1 relates to the documents, is, however, that.

2 THE COURT: Mr. Litt?

3 MR. LITT: Well, your Honor, we did argue this at
4 some length yesterday and I am not going to go through
5 the whole argument. I do want to make a couple of comments.
6 The first is I just want to say again that, and we will
7 have to return to this a little later just so I can understand
8 how we are going to handle certain things, but the First
9 Amendment implications of what this court is apparently
10 permitting in allowing Mr. Armstrong's beliefs about fraud,
11 alleged fraud by the church, L. Ron Hubbard, the first
12 amendment implications of that in the whole way that the
13 case is tried are, in my view, beyond description.

14 I can only reiterate that I believe that to
15 the extent that the court adopted a theory that by a church
16 bringing a suit it somehow has less of a standing to raise
17 its First Amendment interests, if that was the import of
18 the court's ruling, I think that is incorrect and I would
19 ask that the court give it further consideration.

20 THE COURT: Well, I think that that may misstate
21 what I am saying. I am saying that if the church seeks
22 to obtain money damages, the defendant has a right to a
23 fair defense and a fair defense may include the reference
24 to these writings or documents as an effort to explain
25 what he did or attempt to justify it under the law.

26 MR. LITT: He is trying to justify it on a theory
27 of religious fraud which is not justiciable and which can't
28 go to a jury. That is the basis of what we are saying. He is

1 trying to say, I believe, that they were a fraud. A court
2 can't make that determination that they were a fraud.
3 Therefore, it can't be a defense.

4 I am just trying to say that the logic, I think,
5 of what has been done and what is going to happen in this
6 case as a result, Mr. Flynn said it himself, it is not
7 my purpose but it is the outcome, and what this court is
8 permitting, if it allows that to happen, is a trial of
9 religious fraud on a theory of defense.

10 THE COURT: You are the one that is pursuing these
11 actions. I am not. Defendant is not pursuing these in
12 this action.

13 We can deal with the case solely as an equitable
14 matter if the plaintiff wants to do so, but you are seeking
15 monetary damage. But at the same time you are saying I
16 don't want punitive damages. I give up my claim for that.
17 I don't want anything other than the nominal damages on
18 the amount of the conversion. So we are trying this, I
19 guess, for whatever expenses were involved, and if you
20 can proceed on a theory of establishing that there was
21 conversion and that is what we are trying it for, you are
22 seeking this release, all right, they have a point of view.
23 They have a claim that they have certain rights and they
24 are entitled to present them, and I can't put blinders
25 over this case in order to present only a one-sided picture.
26 There are two sides apparently to this lawsuit, as most
27 lawsuits, and it is for the jury to decide.

28 MR. LITT: I would like one point of clarification

1 because I am going to have to, as I will explain further
2 on, have some discussion with my clients concerning the
3 implications of some of the court's rulings, but just so
4 I understand what that ruling is, is the court's ruling
5 that this is relevant to the damages claims but not relevant
6 to the equity claims?

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1 THE COURT: No, I am not.

2 MR. LITT: There is a question --

3 THE COURT: I don't think I can decide the case on
4 an equitable basis without hearing the evidence presented.
5 At the same time --

6 MR. LITT: But, Your Honor, you started out saying
7 that we are pursuing the damages claim. That may be, but
8 we are also pursuing the documents; and there is no -- there
9 is no compromise. There can be no give from the church's
10 point of view and Mrs. Hubbard's point of view about returning
11 the documents.

12 THE COURT: I am not suggesting there should be.

13 MR. LITT: If these matters are relevant, according
14 to the court's theory, to the equitable claim, then whether
15 we are pursuing the damages claim doesn't really resolve
16 anything; because even if we weren't pursuing the damages
17 claim, all these issues would have to be tried, and then
18 the court would be ruling that trying to get the documents
19 back by the Church opens these matters up.

20 THE COURT: Well, I would think that the extent that
21 they -- we wouldn't be dealing particularly with any questions
22 of justifications on the part of the defendant or his state
23 of mind or why he did what he did. We would be dealing more
24 with who has rights to this property at this time; and if
25 it is evidence, it may be that it would be required to be
26 preserved in some fashion. But the point is that this is
27 being juxtaposed in this context because they have a right
28 to defend themselves against these allegations that you have

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1 raised.

2 MR. LITT: Yes, but the reason I raised this --

3 THE COURT: I am not saying that I, at this time, am
4 deciding what evidence would be received in the equitable
5 action. I don't think it would be necessary to get involved
6 in many of these things that you have discussed without the
7 thing being tried; but we have some maxims, "He who seeks
8 equity must do equity." We have some other problems that
9 deal --

10 MR. LITT: The unclean hands defense is not in this
11 case, Your Honor.

12 THE COURT: We would have to deal with raising all
13 these problems in a jury trial, which sometimes creates
14 problems.

15 MR. FLYNN: Your Honor, if I could interject at this
16 point. The defendant is giving serious consideration --
17 and we may know by noontime today -- of waiving our jury
18 claim and having the case tried solely before Your Honor
19 in whatever procedural posture it ends up. We feel that
20 that could greatly expedite this case.

21 In the introduction of evidence in this case
22 the problem of sanitizing before the jury all this evidence
23 could result in a prolonged trial and numerous side bar
24 conferences with regard to what they are going to hear and
25 what they are not going to hear. So we are giving serious
26 consideration, in order to short-circuit what is seemingly
27 turning into potentially a four to five week trial -- we
28 are giving serious consideration to waiving the jury.

1 The plaintiff and the intervenor in this action
2 tried to block our jury rights, and they have taken a very
3 strong position that they don't want a jury. So in that
4 light I am informing the court of this at this point so
5 Mr. Litt will also be informed. If we let the court know
6 by noontime, then a lot of the problems with regard to what
7 has to be sanitized in front of the jury will be obviated.

8 MR. LITT: Your Honor, I am going to object to the
9 comment that we have tried to block their jury rights. I
10 don't know what Mr. Flynn is talking about.

11 THE COURT: I don't know. I assumed that the plaintiff
12 was seeking the jury trial on these matters, primarily.

13 MR. LITT: No. The defendant had requested the jury
14 trial. We had originally waived jury trial.

15 THE COURT: It is immaterial to me.

16 MR. LITT: I object to the characterization that we
17 have done anything to block their jury rights.

18 THE COURT: I will sustain the objection. I am not
19 considering that in any fashion.

20 Insofar as item No. 4, I will receive the evidence
21 as it relates to, obviously, the issues dealing with
22 Mr. Armstrong that we have talked about before. Obviously,
23 at the same time, we are not going to go out on a fishing
24 expedition as to other purported improprieties that have
25 no relationship to this particular situation.

26 By denying this motion I am not suggesting that
27 we would go out and get involved in other things other than
28 what have been specifically referred to by Mr. Flynn in his

6-4

1 stated offer of proof as to what Mr. Armstrong is going to
2 be testifying to.

3 Item 5, alleged criminal or tortious activity
4 by L. Ron Hubbard, Mary Sue Hubbard, Scientologists, the
5 Guardian's office or any Scientology organization. Well,
6 obviously, just in general something like that could not
7 come in. Now, as it may relate, as we talked about in item
8 No. 4 or in item No. 1, in the more specific situations there
9 may be relevance to some of these things; and so I don't
10 know whether this is intended as just a general blanket type
11 of objection.

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12 MR. LITT: Your Honor, in part it is and in part it
13 reflects the problem that we have, especially in terms of
14 the court's rulings, which I think is best saved for the
15 end.

16 But we are going to ask the court, just for case
17 management and so we even know what it is we are supposed
18 to respond to in the way of this novel affirmative defense
19 that the court has permitted, that we get -- that the court
20 require some specification as to the evidence that the
21 defendant intends to introduce.

22 I think the court will see more, when we argue
23 some of the other things, why that is necessary; and, in
24 part, I think the real solution to this problem can only
25 be posed then. We just know from experience, in general,
26 the kinds of charges that get made. You have heard many
27 of them in the courtroom today, ranging from purported theft
28 of \$250 million from the Church of Scientology by L. Ron

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1 Hubbard, its founder. You name it, and we hear it. So we
2 raised it simply to flag the issue in general.

3 I would just save for the end a discussion of
4 procedurally how we are going to proceed, in fact, so we
5 know what we are dealing with and how to proceed with the
6 case. Obviously the general illegality, the court has said,
7 is not admissible. I don't know what it is that the defendant
8 intends to introduce in this regard. I haven't the faintest
9 idea at this point, and we would like to know if there is
10 any --

11 THE COURT: Mr. Flynn has been talking about it. Of
12 course, I realize that both counsel in their presentations,
13 that are somewhat emotionally charged, have strayed somewhat
14 from relevant matters in their eloquence.

15 At the same time, I think that basically what
16 he is saying is what he said this morning insofar as what
17 Mr. Armstrong is going to testify to. And certainly all
18 of the Supreme Court cases say that we are protecting what
19 people believe but not how they act or what they do; and
20 if conduct was directed at Mr. Armstrong's actions, which
21 cause him to have certain beliefs and do certain things,
22 it seems to me those things are relevant and admissible.

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1 So as a general blanket proposition, I will
2 grant your motion.

3 Six, alleged tortious or alleged activity by
4 the Church of Scientology or the Hubbards against individuals
5 viewed as enemies of scientology.

6 This, of course, again, I suppose, if it is
7 something that Mr. Armstrong knows about or relies upon
8 or believes, it may well be admissible as a justification
9 for any conduct that he took. As it may have no relationship
10 to that, it would have no admissibility clearly.

11 MR. FLYNN: It is limited to that, your Honor.

12 THE COURT: All right. As a general proposition,
13 I will grant the motion excluding matters which are more
14 specifically relevant to matters which Mr. Armstrong knew
15 about and more believed or reasonably believed and relied
16 upon.

17 Item seven, an incident which took place in
18 April 1982 regarding a dispute over photographs between
19 Gerald Armstrong and certain scientology staff members.

20 I think Mr. Flynn has already mentioned this
21 in passing. This had to do with his ideas as to what might
22 happen with property.

23 MR. FLYNN: That is exactly correct. This is a key
24 fact in this case as to what caused him to come to me.
25 He believed that since they came and they stole these
26 photographs at the same time he was declared, that they
27 were going to Garrison once they knew the contents of the
28 documents and steal them all. That is why he hired an

1 attorney.

2 THE COURT: Any comment, Mr. Litt?

3 MR. LITT: My only comment, your Honor, is that if
4 theory is what is in Mr. Armstrong's mind, which is just
5 wrong once you adopt that premise, I can't really argue
6 on the photo.

7 Our position, I think, is clear.

8 THE COURT: All right, then, the motion will be denied
9 as to item No. 7.

10 8, the Fair Game Doctrine.

11 MR. FLYNN: Our entire case, your Honor, is predicated
12 upon the fact that Mr. Armstrong went to a lawyer because
13 he observed for ten or 12 years the specific application
14 of the Fair Game Doctrine, not as a personal church policy,
15 and he does not intend to testify about all of the instances
16 where he thought applied.

17 For the court's information, the instances
18 where he thought applied are just shocking. They involve --

19 MR. LITT: I thought he wasn't going to testify about
20 that. What does it have to do with this?

21 MR. FLYNN: He is not going to, but I am going to
22 explain the background of the doctrine.

23 MR. LITT: I am going to object to this. I think
24 it is a blatant effort to prejudice the court. Mr. Flynn
25 has just said he doesn't intend to introduce this evidence,
26 but he wants you to know about that. I don't understand
27 that. I don't understand such a procedure. If it is not
28 relevant and he is not attempting to assert it, and now

1 he is suggesting that this court is going to sit as the
2 trier of fact in the whole case and he will put in all
3 of those things that he, quote, doesn't intend to introduce.
4 If it is not proper, if he is not arguing it is admissible,
5 then he should not be presenting it to the court for the
6 court to determine if it is admissible.

7 MR. FLYNN: If I can respond to that.

8 THE COURT: Yes.

9 MR. FLYNN: In the Allard case, as the footnote indicates,
10 the trier of fact in that case or the judge took evidence
11 initially or took it apparently de bene from what
12 Mr. O'Reilly's office tells me, and the footnote seems
13 to suggest and give the rest of the trial to the defendant
14 in the action to introduce evidence that a Fair Game Doctrine
15 had been canceled as they had alleged in their briefs and
16 apparently during the course of the proceeding. They never
17 did introduce evidence that the Fair Game Doctrine had
18 been canceled, and the reason, I submit to the court, is
19 because if they had introduced evidence that it had been
20 canceled, the plaintiff in that action would have been
21 entitled to introduce evidence that it had not been canceled,
22 and picking up on Mr. Litt's suggestion, I will not go
23 into the details.

24 Suffice it to say, that the application of
25 the Fair Game Doctrine over the last 10 or 12 years the
26 defendant knew about and the 18 years that it has been
27 in force is probably, to quote the U.S. attorney of the
28 Federal District Court --

1 THE COURT: I don't want to get into that. Just
2 deal with what the evidence might be.

3 MR. FLYNN: It basically involves a rampant attack
4 on everyone who ever opposed the Church of Scientology
5 with every crime virtually that could be committed, and
6 everything that could be done, ranging from "we suggest
7 death," all the way to simple, frivolous lawsuits, and
8 I won't get into the details. The details would take me
9 two hours just to give an outline of.

10 Now, Mr. Armstrong, because of his position,
11 knew and saw and heard, for example, of assassination plots.
12 He knew what the Fair Game Doctrine was. Not only did
13 he know, he was drilled on a Pact called the PTS and SP,
14 which basically taught him as a Sea Org member how to
15 deal with enemies.

16 The Pact is some two inches thick, which we
17 don't intend to put into evidence, but basically explains
18 how the Fair Game Doctrine works and what you do to enemies
19 of the church.

20 It has got nothing to do with internal church
21 policy. In fact, if it had to do with internal church
22 policy, then either one of two things would occur.

23 In light of the reality in the real world for
24 the way the Fair Game Doctrine operated, it would make
25 all Church of Scientology policy non-religious or all of
26 it religious.

27 It is simply inconceivable, and I would suggest
28 that in the criminal case of the United States vs.

1 Mary Sue Hubbard they raised the religious defense that
2 they were entitled as a religious matter, and it is suggested
3 right in the case when the District Court of Columbia Court
4 of Appeal dismisses it in a footnote as being just entirely
5 frivolous, but they address some 30 or 40 pages of their
6 memo to it that breaking into 136 state and federal offices
7 was not entitled to a religious defense.

8 But that brings up probably the basic logical
9 problem with claiming that the Fair Game Doctrine is a
10 religious doctrine. Assuming an entirely legitimate religious
11 organization, one that has been recognized as such for
12 hundreds of years, the Presbyterian Church, the Catholic
13 Church, whatever, took a doctrine and said, "Well, the
14 fundamental doctrine of our religion is that anyone who
15 opposes our religion can be lied to, sued, cheated or destroyed,
16 which is the quote from the Fair Game Doctrine in part."

17 Well, if Mr. Litt was correct and all that meant
18 was that in the ecclesiastical circle of that legitimate
19 religion the person could be brought in before the
20 ecclesiastical court or the person could be lied to in
21 the ecclesiastical environment or cheated in the ecclesiastical
22 environment, or another part of it is depriving them of
23 property in the ecclesiastical environment, and if the
24 individual somehow consented as an ecclesiastical matter
25 to even the deprivation of his property, then some spectre
26 of an argument perhaps could be raised that as long as
27 it is confined to the ecclesiastical environment, then
28 it is only a religious doctrine.

When you get into the last element, destruction,
and your Honor may or may not hear, depending on how the
evidence comes in, words in the Church of Scientology are
very significant.

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1 Someone who undergoes Scientology training is
2 drilled on the specific meaning of words. For instance,
3 when you do this PTS and PT Pact, you have to go and look
4 up in a dictionary the exact meaning of every word. And
5 these courses dealing with the definitions of words relate
6 to the fact that you have to have a concrete understanding
7 in your mind of what the word means.

8 So if you take the word "destroy," these Guardian's
9 office agents that implemented these policies -- and I have
10 seen numerous course pacts of Guardian's office agents who
11 did this -- have to go and check off that they understand
12 specifically what the word means, specifically what the word
13 "destroy" means in all of its context.

14 If, as my brother might argue, the word "destroy"
15 only means spiritual destruction, then someone who has
16 undergone the training to implement the Fair Game Doctrine
17 would be limited to the definition in the training manuals.

18 Well, as Your Honor may see in a voir dire hearing,
19 for example, that is simply not what happened in training
20 Guardian's office agents to go destroy enemies. They were
21 trained, if we ever get into a voir dire hearing on this
22 issue -- they were trained to go out in the temporal world
23 and do things like putting LSD in toothpaste, putting drugs
24 in drinks, framing journalists --

25 MR. LITT: I thought we weren't getting into this.

26 MR. FLYNN: That is what they are trained to do.

27 But assuming, even, that some idea of spiritual
28 destruction was only what they are trained on, which is simply

8-3

1 the view that words such as are expressed in the Fair Game
2 Doctrine are, one, purely ecclesiastical and, two, even if
3 understood by staff members is purely ecclesiastical and,
4 three, even having that understanding the staff member could
5 thereafter go out and engage in conduct which was detrimental
6 to Mr. Armstrong -- if that rule was followed, that the court
7 could not recognize that type of conduct as being actionable
8 in a civil court, society would be totally -- we would be
9 suffering totally from anarchy. There would be no law.
10 Any religion could adopt any law whatsoever, claim that it
11 was religious doctrine and lie to, sue, cheat or destroy
12 or take property on the premise that they are doing it under
13 the belief that it is religious.

14 If Your Honor adopted that logical approach,
15 then either one of two things would happen. Either all of
16 the religious doctrine in every religion would have to be
17 cognizable in order to make it somehow legitimately involved
18 in civil court, or Your Honor would have to do what every
19 court in the country does and particularize between what
20 is legitimately religious doctrine on a threshold finding
21 and what has to do with the civil courts.

22 Now, with regard to this particular case,
23 Mr. Armstrong, as the testimony will show, at least initially
24 in voir dire or, if the jury is waived, before the court
25 or before the jury, if it is permitted, was in a state of
26 terror after he left the Church of Scientology because of
27 what he knew and because he knew that the Fair Game Doctrine
28 was going to be applied against him. When the S. P. Declare

8-4

1 came out and it said very temporal, nonspiritual things,
2 like he had lied about Hubbard, he had stolen documents and
3 a host of some 20 or 25 other things that he had allegedly
4 done, that, as the evidence will overwhelmingly show if we
5 ever have to prove it from former Guardians' office agents,
6 former staff members who knew what the Fair Game Doctrine
7 implies, in Mr. Armstrong's mind subjected him to an immediate,
8 unended, open attack and assault by anyone in the Church
9 of Scientology; and that is, in effect, what began. That
10 is what drove Mr. Armstrong to see me.

11 So all of that evidence goes to his state of
12 mind; and if Your Honor wishes to put Mr. Armstrong on the
13 witness stand right now and ask him all the questions you
14 want relative to his state of mind, I would suggest to the
15 court you will see, in very candid terms, where Mr. Armstrong's
16 mind was at the time all of this took place. But, in any
17 event, his state of mind with regard to hiring a lawyer when
18 he knew what he was going to be subjected to, we submit,
19 was justified. That is one reason why the Fair Game Doctrine
20 should come into evidence.

21 Probably more importantly, and the reason we
22 argued at length in our brief, which I won't completely
23 reiterate, which was recognized in the Allard case, is that
24 there are already on this record, going to the fundamental
25 issues in this lawsuit, namely who owns or had the right
26 to possess these documents, totally 180 degree inconsistent
27 statements, not only between the plaintiff and the intervenor
28 but inconsistent statements on the part of the intervenor

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1 not the case, but further assuming that, if members of the
2 church believed that the Fair Game Doctrine was solely an
3 ecclesiastical doctrine which has got nothing to do with
4 reality, but even if they believed it and even if Mr. Armstrong
5 during the course of his tenure in the church believed that
6 it was a purely ecclesiastical doctrine which has got nothing
7 to do with reality, once they engaged in conduct outside
8 that belief, in granting full scope of religious belief to
9 the doctrine itself -- once they engaged in conduct outside
10 that belief which resulted in some type of conduct in the
11 temporal world, such as taking photographs, subjecting
12 Mr. Armstrong to some of the things he was subjected to,
13 or suing him in the Los Angeles Superior Court --

14 Once that conduct was injected into the previously
15 ecclesiastical environment, the Supreme Court has said over
16 and over and over again, one, religions can't commit fraud
17 and, two, once they engage in conduct there is a big dichotomy
18 between belief and conduct. When it becomes expressed, it
19 is cognizable in a civil or criminal court.

20 Now, I would suggest to the court that if Your
21 Honor followed the alternative to that, the logical
22 alternative, namely that the Fair Game Doctrine is purely
23 ecclesiastical, and even if it somehow got expressed by mistake
24 of a staff member who went out and did something in the
25 temporal world to Mr. Armstrong, aside from hiring private
26 detectives to smash into his car, assault him on the street,
27 things that Judge Cole in this court recognized -- aside
28 from doing things like that, if this court were to adopt

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1 herself, all of which goes to the issue of credibility.

2 Now, the sequel to the Fair Game Doctrine, which
3 I don't intend to introduce into evidence, but which fleshes
4 it out a little bit, is called TR-L, Trained Routine for
5 Lying under oath. It is a written policy of the Church of
6 Scientology where Guardians' office agents or witnesses are
7 drilled on how to lie under oath. It has been recognized
8 and introduced in other judicial proceedings.

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1 It is a formal training procedure. In fact,
2 I will tell the court right now that every witness who
3 appears on this witness stand for the Church of Scientology
4 will have gone to witness school and will have been drilled
5 in that policy.

6 MR. LITT: Your Honor, this is really out of hand.
7 I prepared these witnesses and that is false. I am the
8 person who prepares the witnesses.

9 Mr. Flynn has no right to make these kinds
10 of allegations. This is just out of control. I don't
11 have anything else to say.

12 THE COURT: I don't know whether it is in control
13 or out of control in a sense because, I suppose, this may
14 be the subject of another in limine motion as to whether
15 he is permitted to cross-examine these witnesses on the
16 subject. If he has a reasonable basis for believing this
17 is the truth, it may be he is entitled to go into it. I
18 don't know.

19 MR. FLYNN: Some of my basic witnesses, including
20 probably the most significant witness in this case, was
21 drilled and went to witness school for the IRS proceeding
22 in which she didn't pass witness school. They dropped
23 her as a witness.

24 But in any event, the Fair Game Doctrine says,
25 "Lie to and cheat." It is hard for the court, I am sure,
26 to try to comprehend in a realistic manner that someone
27 could really believe that an enemy, a suppressive person,
28 can justifiably be lied to and cheated, but it is the policy

1 of the Church of Scientology to lie and cheat enemies as
2 a matter of course.

3 That is why the Judge, I submit, in the Allard
4 case introduced it on the issue of credibility because
5 the witnesses in that, just as Mary Sue Hubbard will testify
6 here, and other witnesses for the Church of Scientology
7 will testify here, are entitled to as a matter of policy
8 to lie to enemies of the church, of which Mr. Armstrong
9 is one of the top enemies in the world now.

10 So, on the issue of credibility the Fair Game
11 Doctrine, I submit, should come into evidence if we can
12 make a prima facie showing that it is the policy of the
13 organization to lie to Mr. Armstrong and/or lie, period,
14 and I submit to the court that we will be able to make
15 an overwhelming showing to that effect if that is necessary.

16 So, under the Allard case we submit on the
17 issue of credibility it is admissible, and again on that
18 point, that issue was fully resolved by the California
19 Court of Appeal with regard to its admissibility.

20 The claim that Mr. Litt made at the outset
21 of this proceeding that the First Amendment issue was not
22 raised with respect to that is simply shown by a reading
23 of the Allard case, which I don't have in front of me right
24 at the moment, but right at the beginning the paragraph
25 or two right before where the court is talking about the
26 credibility, that paragraph relates to religious doctrine.

27 Right at the end of where the court is talking
28 about religious doctrine, it is talking about the

1 introduction of the Fair Game Doctrine goes back into the
2 same consideration, and says that it is not inadmissible
3 because it was religious doctrine.

4 So, given all of that, your Honor, we submit
5 that on the state of mind and on the credibility of the
6 witnesses, the reason we are in this courtroom is because
7 of the Fair Game Doctrine.

8 THE COURT: Okay, Mr. Litt?

9 MR. LITT: Well, let me start out with the inconsistent
10 statements. The inconsistent statements that Mr. Flynn
11 refers to are inconsistent statements, and there are such
12 inconsistent statements made because Mr. Armstrong took
13 the documents and nobody else knew what he had except him.
14 So when the church first filed the action, it said they
15 are our documents. It turns out that most of them were
16 Mr. Hubbard's documents, so then the church changed based
17 on Mr. Armstrong's testimony and said, "They are
18 Mr. Hubbard's documents." And that is this major inconsis-
19 tency. This is the exemplification apparently of the policy
20 of lying that Mr. Flynn is referring to.

21 Now, we really have to break this up into two
22 parts. There is an evidentiary part and there is a First
23 Amendment part. The defense wants to say and presumably
24 this would apply to any bad, quote bad organization that
25 they are bad, and they have bad policies and those bad
26 policies are to rob. Therefore, we can show that these
27 have these bad policies to rob in a burglary prosecution.
28 What is the difference?

1 Somebody is a member of an organization, gang.
2 This comes up quite a bit in criminal cases, a gang member-
3 ship, and the cases generally in discussing something as
4 attenuated as that, just membership in a gang for purposes
5 of showing therefore that they are more likely to do this,
6 it is not permitted just as an evidentiary matter.

7 What Mr. Flynn really lays out here is he wants
8 to say they have a policy to do A, and therefore they did
9 A. Well, it doesn't work that way. Prove A.

10 You don't prove A by proving a policy to do A.
11 It is not habit or custom evidence. You can't use habit
12 or custom which talks about routine activities as an eviden-
13 tiary theory to admit policies, so that the first problem
14 that exists is that the -- this type of evidence which
15 is, I think the court has heard enough to know, is extremely
16 highly-charged and extraordinarily prejudicial is being
17 used to substitute for proof of facts. It is really an
18 effort to say that any allegation we make is true because
19 look at this policy. That is the purpose. That is the
20 effect of it, and it is, I don't care if this were not
21 a religious organization, and I don't care if the policy
22 were go after enemies in the second World War.

23 The impact of that is overwhelmingly prejudicial.
24 It is not permitted to prove acts through policies except
25 in extraordinary limited circumstances which do not apply
26 here, but that is not -- that is only half of the problem.

27 Mr. Flynn refers to the Allard case. The only
28 thing I can say about the Allard case is that the full

1 presentation of the religious context of this was not presented
2 to that court, and frankly I am not presently prepared
3 to do it fully, but I will make a partial offer of proof
4 and we will supplement it so it, at least, is in the record
5 in this case. But I would like the court to be aware.

6 Mr. Flynn quotes from a one-paragraph statement
7 in a policy letter of Mr. Hubbard made in 1967. Now I
8 want to show that the court under the context of this policy
9 letter which is pulled out of context and which intrudes,
10 as I will show, into religious belief and doctrine. I
11 want to quote from the first mention that at least I have
12 been able to determine of this in Scientology materials.
13 It is from a policy letter of 1 March 1965 called
14 "Suppressive Acts. Suppression of Scientology and Scientolo-
15 gists. The Fair Game Law."

16 Now the court should understand the very title
17 shows the problems that we face. "Suppressive acts" are
18 Scientology terms. They are religious terms. They refer
19 to acts that within Scientology are considered against
20 the interests of Scientology.

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1 There are a lot of things there. For instance,
2 testifying in court against a Scientologist, without opposing
3 it, is considered a suppressive act. Okay. Scientology,
4 as many religions, just using that one example, they have
5 an internal justice system; and you must make recourse to
6 that within Scientology. You do not sue Scientologists in
7 the civil courts. Those disputes are to be resolved
8 internally. The Jewish tradition was identical, as one
9 example.

10 Now, this document says, this first mention of
11 Fair Game says, "A suppressive person or group is one that
12 actively seeks to suppress or damage Scientology or
13 Scientologists by suppressive acts. Suppressive acts are
14 acts calculated to impede or destroy Scientology or
15 Scientologists." And it goes on at great length, which I
16 am not going to read.

17 (Reading:)

18 "A suppressive person or group
19 becomes fair game. By fair game is meant
20 without right for self, possession or position,
21 and no Scientologist may be brought before
22 a Committee of Evidence or punished for any
23 action taken against a suppressive person or
24 group during the period that that person is
25 fair game. A Committee of Evidence may be
26 called by any convening authority who wishes
27 more concrete evidence of efforts to suppress
28 Scientology."

1 And then it talks about amnesties for people
2 declared fair game. The court should understand that fair
3 game refers mainly to Scientologists.

4 In a later policy letter it talks about the fact,
5 that for commission of certain Scientology crimes or
6 suppressive acts that one can have cancellation of
7 certificates, cancellation of classifications and awards
8 and can become fair game.

9 Then it goes on to say, in another policy letter
10 written by Mr. Hubbard also in 1965 -- he says that "When
11 a person announces he is no longer a part of a group, he
12 has rejected the group. He has also rejected its codes and
13 rules. Of course, he has also rejected the protection to
14 which he was entitled as a group member. It does not make
15 sense to extend the protection of the group to the person
16 seeking to destroy the group. That is like encouraging a
17 disease. Hence, we have a fair game law."

18 And then it goes on to talk about -- let me see.
19 It goes on to talk about the problem of sort of making this
20 policy too expansive. It says, "Students or PC's" -- that
21 is a reference to PreClears -- "who seek to resign or leave
22 courses or sessions and refuse to return, despite normal
23 efforts, become suppressive of that course." And then in
24 this context it talks about the fact that in such cases there
25 may be a cancellation or the fair game law may be invoked.

26 Now, I am reading these to give the court a sense
27 of the context of this Fair Game Doctrine, which we will --
28 I don't have it yet. The case has a lot of things going.

1 We can demonstrate, and we will be prepared to demonstrate,
2 that the type of policy that I am describing here is a typical
3 religious policy that is not unusual.

4 In another document from 1965, a policy letter
5 from Mr. Hubbard, it states, "Only when this," referring
6 to a waiver or quitclaim, "is signed may the student" --
7 this is referring to a Scientology student -- "have his course
8 fee returned, but no other fees, as he accepted that service.
9 The ex-student should realize this makes him fair game and
10 outside our justice codes. He may not have recourse of any
11 kind beyond refund and after signing can only return to
12 Scientology as per policy on fair game."

13 In another document it says, "Civil court
14 action --" remember that I said that Scientologists could
15 not be sued by other Scientologists. It says, "Civil court
16 action against S. P.'s to effect collection of moneys owed
17 may be resorted to as they are fair game."

18 Then in a document from the end of 1965, entitled
19 "Suppressive Acts, Suppression of Scientology and
20 Scientologists, the Fair Game Law," which replaces the document
21 that I began with, it says, "By fair game is meant may not
22 be further protected by the codes and disciplines of
23 Scientology or the rights of a Scientologist."

24 Now, let me read to you from the testimony of
25 Gerald Armstrong, not in this case but in another case where
26 he was being called as a purported expert, among other things,
27 on fair game. This is from the case of Cooper versus Church
28 of Scientology. It is pending in this district. On what

1 the meaning of the doctrine itself is, not on what he says
2 the church does but on the meaning of the doctrine itself,
3 in answer to a question by me, his answer was the following:

4 (Reading:)

5 "So, okay. I would say these two
6 things. He," referring to a suppressive
7 person, "who has been declared has no rights
8 as a Scientologist; and a Scientologist who
9 commits acts against him is not actionable
10 within the Scientology justice system,"
11 although I will tell the court that that is no
12 longer true. But that is his description.

13 "So that pretty well covers the
14 attitude or the direction that is given toward
15 the handling of a suppressive person, and
16 that direction or attitude is fair game."

17 Mr. Armstrong says that as to what the doctrine
18 was it is what I have just said. Now, the policy that
19 Mr. Flynn is so fond of quoting is not a policy that is on
20 fair game. In fact, it is from a policy which has since
21 been cancelled which talks about penalties for lower
22 conditions.

23 There are various conditions within Scientology.
24 I hope the court is getting the sense of the context in which
25 we will deal with this and what Mr. Flynn is asking us to
26 have to put on trial here. That is why I am going through
27 this with the court, and this is really only scratching the
28 surface.

1 These are the religious writings that guide the
2 Church of Scientology that I am now having to interpret for
3 this court, and this is only an indication of what it is
4 and why it cannot come into evidence. This policy is not
5 a policy on fair game. It is not a policy on suppressive
6 persons. It is not a policy on suppressive acts. It is
7 a penalty on various conditions, conditions relating to whether
8 or not the person has questions or reservations. There have
9 been written over the years by Mr. Hubbard various policy
10 letters that talk about different conditions, and they are
11 states of mind in relationship to Scientology; and one of
12 those conditions is the condition of enemy. A person can
13 be declared, within Scientology, an enemy and remain a
14 Scientologist. And if we have to, we will present evidence
15 from people who have been declared and are Scientologists
16 today.

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11 1 So in this context of the conditions being
2 material in relationship to state of mind regarding
3 Scientology in a document entitled "Points For Lower Conditions"
4 it states:

5 "Mini SP Order. Fair game may be deprived
6 of property or injured by any means by any
7 Scientologist without any discipline of
8 the Scientologist."

9 Then goes on: "May be tricked, sued or lied
10 to or destroyed."

11 The four words that I can assure the court
12 I have heard more times since I have been involved in Scien-
13 tology litigation than any other four words one could name
14 because it is grist for the mill of anybody who wants
15 to be involved in litigation with the church. You take
16 these words, you take them out of context. You throw
17 them out. You frighten people. You say that this
18 organization has a policy of telling people to go out
19 and destroy anybody who is an enemy.

20 It is so far -- this categorization which
21 is no longer -- if the court wants, and I will just represent
22 at this point so I can cut things short, that I can go
23 through and track the later descriptions of enemy which
24 do not use this language. It is true and the Fair Game
25 Doctrine; that is, the use of the term "fair game" was
26 canceled, and Mr. Hubbard said quite straight-forwardly,
27 "It has an adverse public relations effect," meaning that
28 it gets misconstrued.

1 The doctrine that I have described, the doctrine
2 that says that Scientology will not provide access to
3 its internal systems for those who are opposed to it remains
4 true.

5 So, in that sense what Mr. Flynn says is right,
6 the real Fair Game Policy hasn't been canceled. What
7 it meant hasn't been canceled with one modification, which
8 has to do with the fact that any crime committed by a
9 Scientologist today is actionable within Scientology.

10 I have not put forward at this point the materials
11 that we will, if necessary, provide to the court from
12 religious experts, from people who have been through this
13 process, and this was not prepared in Allard, your Honor.
14 I am sorry. It simply wasn't. What I have just told
15 the court and the context of this was simply not presented.

16 I have checked and there is no indication
17 that a serious presentation and explanation and offer
18 of proof of the First Amendment elements of the doctrine
19 were involved.

20 If this doctrine is allowed to be introduced,
21 you are opening the door to the introduction of religious
22 doctrine. If they want to prove fact A, let them prove
23 fact A. That is the normal course.

24 Now, the other theories, this is the real
25 sticking point, especially in light of the court's rulings,
26 Mr. Armstrong's state of mind is relevant. Mr. Armstrong
27 therefore can say whatever he thinks. He can distort.
28 He can refer to religious doctrine. He can do anything,

1 and somehow it becomes relevant because whatever is in
2 his mind is all of a sudden all right.

3 The court must place some limitations on that,
4 at least where it intrudes into First Amendment issues
5 because you will be requiring us otherwise to try in this
6 court the meaning of religious doctrine.

7 The court cannot -- we have cited cases, Serbian
8 Archdiocese, there is a whole line of cases. You cannot
9 try religious doctrine. This court and a jury sitting
10 there cannot determine what that means. It is not allowed,
11 and yet Mr. Flynn stands up and says this is the most
12 important thing. Taking the church's religious doctrine
13 and putting it on trial is the most important thing for
14 their defense.

15 Well, if that is the most important thing,
16 then one or another thing is going to happen. Either
17 this court is going to allow gross invasion of constitutional
18 rights and First Amendment rights or the court is going
19 to require them to prove a case and to prove this affirmative
20 defense in the normal way and not by resort to generalized
21 claims based on internal doctrine about what this organization
22 does and how bad it really is.

23 THE COURT: Well, gentlemen, I guess if I were to
24 rule in some ways, I would be doing things that were prepos-
25 terous, according to Mr. Flynn, and if I rule the other
26 way, I will be doing things that are totally outrageous
27 and incredible and stamping on the First Amendment. So
28 I really probably should abdicate, but I don't want to

1 do things that are either preposterous or stamp on the
2 First Amendment.

3 Be that as it may, it seems to me that we
4 come right back down to where we were and where we have
5 been. Once you start on a logical train, you follow that
6 logical train and it seems to me it is one thing to talk
7 about religious principles. It is something else to talk
8 about how they are applied in practice and how they are
9 interpreted in practice and whether it results in conduct
10 which may be criminal or tortious.

11 It seems to me that obviously the Allard case
12 stands for exactly what is presented there and nothing
13 more or nothing less. On the evidence that was presented
14 there it was permissible to receive that evidence in evidence.
15 There was no problem. The Court of Appeal bought that.

16 This is a different case and there may be
17 different problems, but it seems to me coming back to
18 why Mr. Armstrong took these particular documents and
19 turned them over to his lawyer and/or amassed them and
20 turned them over to his lawyer, getting into his state
21 of mind, the reasonableness of his conduct, whether he
22 acted in good faith, whether he was really taking them
23 for some other purposes, whether or not as an objective
24 matter there was some reasonable basis for his belief.
25 So, it seems to me that to the extent that it can be supported
26 through testimony that this is something other than simply
27 a religious principle, that the evidence would be admissible.
28 So, to the extent that it affected, amounted to conduct,

1 I would assume we are talking about not principles but
2 how they are actually applied in practice, in reality,
3 there may be two sides to the coin, but it seems to me
4 that is not something about which I can exclude evidence. .

5 So far as credibility of witnesses is concerned,
6 of course, any time you permit evidence, you are going
7 to have evidence that bears upon the subject of credibility
8 of witnesses. Obviously this language that was in this
9 1965 or whatever certainly would be very detrimental to
10 any witness' credibility if he said I believed that. I
11 accepted it and followed it.

12-1

1 I suppose if we are going to get into whether
2 or not they should be received on the matter of credibility
3 of witnesses, as distinguished from previously stated, there
4 probably should be some evidentiary presentation before we
5 get into that before any jury, because if that doctrine didn't
6 have any factual basis to how Scientologists act in relation
7 to somebody who is given a suppression order, then, of course,
8 the prejudice would surely outweigh any probative value that
9 goes to credibility of witnesses.

10 Again, of course, I don't know what is in these
11 documents that are under seal. Since the source of any of
12 these policies is Mr. Hubbard, if there is something suggested
13 that there is some documents that are under seal in which
14 he takes a contrary position on some of these purported
15 changes, I presume that that would be admissible as to what
16 this concept, this doctrine, means in practice. Certainly
17 the Fair Game Doctrine, as you have expressed it, is certainly
18 very ambiguous. Certainly one could interpret it in various
19 ways.

20 If the person who is declared suppressed or an
21 enemy or subject to the Fair Game Doctrine -- if people within
22 Scientology who deal with him are not subject to discipline
23 under the rules of Scientology, that suggests or one
24 interpretation could be that they are free to do whatever
25 they want to do so far as the church is concerned in dealing
26 with them. They cannot be disciplined within the Scientology
27 system.

28 So, again, as it relates to how Mr. Armstrong

12-2
1 behaved and what he did, why he did it, I think that his
2 knowledge of the doctrine as it applied in practice and in
3 principle and things which may have occurred, or at least
4 his version of what may have occurred, to him would be
5 admissible. It is being offered as to credibility. I think
6 we will have to have some type of hearing outside the presence
7 of the jury as to whether any of these particular phrases
8 would have application.

9 I would also indicate that if there is any thought
10 of cross-examining any Scientology witnesses on this witness
11 school, again, this may have to be something which we would
12 have to take up outside the presence of the jury to be sure
13 there is a factual basis for it or something which would
14 warrant going into that subject; because certainly that would
15 be very prejudicial to present to a jury if it cannot be
16 proved up.

17 MR. FLYNN: I wouldn't ask any question like that,
18 Your Honor, until I cleared it with the court.

19 THE COURT: All right. No. 9, Suppressive Person
20 Declared or Declare either in relation to Gerald Armstrong
21 or in general, I think we have pretty much thrashed that
22 out already.

23 Mr. Flynn has indicated he wants to present the
24 fact that his client received this communication, he was
25 a suppressive person declared; and his knowledge or beliefs
26 as to what that meant, it seems to me, would be relevant
27 and material. Just in general as to other people I don't
28 think it would be have any bearing, except insofar as

1 Mr. Armstrong was aware of it and had some reason to believe
2 that it might apply to him. So I will deny it in that sense.

3 The use of "Black Propaganda" -- let's take a
4 recess before we get into that. We have been going for an
5 hour and a half or so. Fifteen minutes.

6 (Recess.)
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1 THE COURT: All right. We are back in session. We
2 were talking about the subject of Black Propaganda.

3 Is that something you plan to get into,
4 Mr. Flynn?

5 MR. FLYNN: I don't know at the present time, your
6 Honor. It depends on what evidence the plaintiff intends
7 to introduce to refute the evidence of the Suppressive
8 Person Declare.

9 The policy basically says, and I have got it
10 here, that you take germs of truthful information and you
11 add on them false information, and you disseminate it to
12 destroy the person's reputation. It is a policy that is
13 extensively followed, a very important policy of the Church
14 of Scientology.

15 In order to keep the issues more focused, I
16 don't intend to get into it unless they try to introduce
17 evidence that some of the things in the Suppressive Person
18 Declare are actually true.

19 THE COURT: Okay, I will grant the motion with the
20 proviso that if you desire to get into that, you have to
21 do it outside the presence of the jury and establish a
22 basis for it.

23 11. Alleged control by L. Ron Hubbard of
24 Scientology organizations and finances.

25 MR. FLYNN: This is one of the major reasons that
26 Mr. Armstrong was declared suppressive, and one of the
27 major reasons he came to me, and one of the major reasons
28 that the documents are important particularly with regard

1 to item number 13, and probably the key witness in the
2 case, Laurel Sullivan, Mission Corporate Category Sort-out.

3 What we intend to do is simply try to introduce
4 evidence as to in a narrow way his course of conduct and
5 his state of mind with regard to the documents as to why
6 he came to me. There is extensive information in this
7 document relative to this issue. Mr. Hubbard issued a
8 dispatch in late 1979 and early 1980 when the IRS case
9 was ongoing, there was this fear of the shredding operation,
10 the fear of a raid which I have already explained to the
11 court which was the purpose of the shredding operation
12 to take all information that connected Hubbard to the church
13 or particularly to organizations and finances in order
14 to prevent the IRS and the Justice Department from getting
15 the materials.

16 Now, because of that, they then entered into
17 the Mission Corporate Category Sort-out where they destroyed
18 some 600,000 documents which totally showed that Hubbard
19 did control the church and which related to the funneling
20 of approximately \$250 million to Lichtenstein bank accounts.

21 Hubbard issued a dispatch saying that he had
22 resigned in 1966 and that he had had absolutely no involvement
23 with the church and had received no church funds since
24 that period of time other than \$35,000 a year as a consulting
25 fee. Well, the documents, of course, prove total control
26 by Hubbard during this period of time, and the witness
27 who was in charge of MCCS, Laurel Sullivan, Mission Corporate
28 Category Sort-out, which there are two very important tape

1 recordings on file in this court, these tape recordings -- they
2 are having a meeting --

3 THE COURT: Well, we talked about this being a possible
4 attorney-client privilege.

5 MR. LITT: That is correct, your Honor.

6 MR. FLYNN: We claim it is waived because the tape
7 recordings were given to Omar Garrison, and, in fact --

8 MR. LITT: By Mr. Armstrong, your Honor, after he
9 left the church when he had these tapes that he had gotten
10 while he was a church staff member which were thought to
11 be blank. He found out what was on them. That is his
12 testimony.

13 MR. FLYNN: Your Honor, the evidence will be that
14 as part of the collection of documents they gave these
15 tape recordings to a journalist. The case law, and I don't
16 have it right in front of me, but I submit to the court
17 the case law is very clear. First of all, the party has
18 got to assert it.

19 Let me back up further. First of all, it isn't
20 even an attorney-client meeting. Let me explain to the
21 court what it is since we are getting into it.

22 MR. LITT: Your Honor, he cannot go into the conver-
23 sation itself until he establishes the waiver. You cannot
24 violate the privilege in order to establish that no privilege
25 exists. He must prove by extrinsic evidence --

26 THE COURT: All I think he is saying is he wants
27 to show that it wouldn't be privileged.

28 MR. LITT: He wants to show by the contents of the

1 conversation.

2 THE COURT: No, I agree you can't do that. You can't
3 show it is not privileged by the contents. You have to
4 first determine that it is either privileged or not privileged,
5 and if it is not privileged or it is privileged and then
6 waived, then you get into the contents.

7 MR. FLYNN: I will confine myself to the argument
8 without content itself.

9 What it was, it was a meeting of Laurel Sullivan
10 and Alan Wertheimer, an attorney who appeared in behalf
11 of L. Ron Hubbard.

12 On behalf of the church an attorney named
13 Charles Parsell and several other individuals.

14 MR. LITT: Including two other attorneys.

15 MR. FLYNN: Including several other attorneys.

16 They were negotiating, one attorney representing
17 Hubbard, Wertheimer; the other attorneys representing the
18 church, and if the court listens to the tape this will
19 be very clear. They were negotiating how to sort out and
20 without getting into the contents, they were negotiating
21 how to sort out Hubbard's potential liability.

22 MR. LITT: That is getting into the contents and
23 the point -- the prima facie issue is that it was a meeting
24 by Mr. Flynn's own description of attorneys and clients
25 representing different parties. He claims that there was
26 a fear of litigation according to Mr. Flynn. He just said
27 it a moment ago and now he wants to halfway go into the
28 contents.

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1 When you have a meeting between lawyers and
2 clients, whether it is one lawyer with one client or various
3 lawyers with their clients, it is privileged; and that is
4 the end of the discussion, and the only issue left is waiver.

5 THE COURT: I am not so sure about that. It depends
6 on the circumstances. If they are up there negotiating a
7 contract at arm's length, I don't see how you can --

8 MR. LITT: It is not a contract, Your Honor. It related
9 to the whole -- Mr. Flynn claims that there was issues about
10 litigation. At the time there was Internal Revenue Service
11 litigation going on with respect to the Church, in which
12 Mr. Hubbard was a prominent personage raised, although he
13 was not a party to the IRS litigation. And we have a
14 declaration that has been submitted to the court from a woman
15 named Lisa Britowich, who was a staff member of the Church
16 at the time, who establishes that this meeting related to
17 the whole question of the relationship between L. Ron Hubbard
18 and the Church, and the litigation issues involving any
19 liabilities that may face one party or the other in relation
20 to expected litigation or existing litigation.

21 THE COURT: Where is that declaration? We have so
22 many different documents here.

23 MR. FLYNN: If I could just correct one thing, Your
24 Honor. You will hear right in the tape recording --

25 THE COURT: It may be that I won't be hearing the tape
26 recording if I conclude that it is privileged and hasn't
27 been waived. That is the problem.

28 MR. FLYNN: They were negotiating movie rights and

14-2
1 what to do with \$10 million, and there was an attorney who
2 was clearly representing one party, namely the church, and
3 an attorney clearly representing another party, namely
4 Mr. Hubbard; and they were negotiating these rights, and
5 then they got into the issue of what to do with these funds
6 illegally funneled to a corporation called Religious Research
7 Foundation.

8 MR. LITT: Your Honor --

9 THE COURT: Now we are getting into the substance,
10 and we are talking about whether this is privileged or not.
11 I don't want to hear about it if I conclude there is a
12 privilege.

13 MR. LITT: On the question of where the declaration
14 is, unfortunately, I thought it was attached to the subject
15 matter motion in limine. It is at least not attached to
16 my copy, but it should have been attached to the court's
17 copy. If it wasn't, then a mistake was made; and we can
18 provide the declaration to the court and would ask that any
19 further discussion of this wait.

20 THE COURT: You have an item No. 2 on your exhibits
21 in support. This may be it. Let's see if I can find it.

22 MR. FLYNN: I can tie more direct relevance in, too,
23 Your Honor.

24 THE COURT: I finally found it at the bottom of this.

25 I have read this declaration, and I would think
26 this would certainly create a prima facie finding or basis
27 for finding that there was an attorney-client privilege.
28 So I will sustain the objection at this point.

14-3
1 It doesn't mean to say that if other evidence
2 were presented to me or a question of waiver -- that presents
3 another problem. If Mr. Armstrong had these documents with
4 permission and was authorized to turn them over to third
5 parties, I don't see that there could be any --

6 MR. LITT: That is not the case, and it is not his
7 testimony, Your Honor. His testimony is that he was given
8 what were thought to be blank tapes to use as a Scientology
9 staff member in his archives post. After he left the church
10 he took the tapes with him and inadvertently played them
11 and found out that they had these conversations on them,
12 and he gave them either to Mr. Garrison or Mr. Flynn. That
13 was his testimony. That is not a waiver. A waiver has to
14 be a knowing and intentional foregoing of the privilege.

15 THE COURT: I know that, a knowing, intentional
16 relinquishment of a known right. And if he didn't have
17 authority to have them and wasn't authorized to make a waiver
18 on their behalf, the privilege can be asserted.

19 MR. FLYNN: Your Honor, if I could just -- I will accept
20 Your Honor's ruling, but just bring a couple of things to
21 Your Honor's attention for when we get into the evidence.

22 These tapes are quite important to our case for
23 a number of reasons, and I believe the evidence will be totally
24 contrary to what Mr. Litt just said. But without getting
25 into it, one of the reasons that the problems came to a boil
26 when Armstrong left was this document I have in front of
27 me which is attached to some of the -- it is attached to
28 the record. It is what they tried to make him sign the day

14-4
1 he left the church. And the first few sentences state, "I
2 recognize and understand that neither Ron nor Mary Sue Hubbard
3 receive any compensation or remuneration from training or
4 processing by the Church, that neither Ron nor Mary Sue Hubbard
5 are officers or directors of the Church, and that neither
6 of them are in any manner responsible for actions of the
7 Church."

8 MR. LITT: Your Honor, can I ask what we are arguing?

9 THE COURT: This goes, I guess, to this subject of
10 item No. 11, alleged control by L. Ron Hubbard of Scientology
11 organizations and finances.

12 MR. FLYNN: So he was supposed to sign this under oath;
13 and then he could be made subject to, apparently, a \$10,000
14 legal penalty if he violated it by giving out information
15 that was contrary to what he had signed. Well, he knew,
16 because of what he had been collecting for a year and a half
17 and because of these tape recordings, that it was just totally
18 false. He knew that L. Ron Hubbard had been receiving millions
19 of dollars for years, over \$200 million, in fact.

20 MR. LITT: Your Honor, this has nothing to do with
21 anything. I don't understand what this has to do with.

22 THE COURT: Let counsel finish before you interrupt
23 him.

24 MR. LITT: All right.

25 MR. FLYNN: So he knew that they were making him --
26 the organization, the plaintiff here, was trying to make
27 him sign a document which he knew was totally false. That
28 is one of the reasons he left the organization, and that

1 was his state of mind with regard to the type of activities
2 that the organization engaged in and would engage in against
3 him in the future.

4 But, in any event, we can leave this issue at
5 the present time. I submit the evidence from the person
6 who ran the MCCS Mission, Laurel Sullivan, will be contrary
7 to what Mr. Litt has just informed the court. The evidence
8 from Mr. Armstrong will be contrary, that it was a negotiation
9 for movie rights between two arm's length parties.

15 1 The tape recordings themselves say that.

2 MR. LITT: Your Honor --

3 THE COURT: Well, I am not considering --

4 MR. FLYNN: And we have got the issue of waiver.

5 THE COURT: Well, at this point I will grant the
6 motion at this time. It doesn't seem terribly relevant.

7 We get into a trial as to who controls the
8 Scientology organization and finances. At the same time,
9 subject to the same proviso, the court will reconsider
10 if something else develops and if we have other testimony
11 which would cause the court to change its position on
12 the privilege problem.

13 Number 12. Biographical information concerning
14 the history or background of L. Ron Hubbard, Mary Sue Hubbard,
15 or the religious movement of Scientology.

16 Well, I gather that you desire to present evidence
17 concerning what information Mr. Armstrong gleaned from
18 the documents concerning the background of Mr. Hubbard
19 and Mrs. Hubbard and/or the religious movement of Scientology
20 as the basis for his actions?

21 MR. FLYNN: That is correct, your Honor.

22 THE COURT: All right. Well, we have batted this
23 around enough. I know that Mr. Litt doesn't feel it is
24 appropriate. This may be information that would be
25 characterized as a biography of the church, hagiography
26 of the church. I probably mispronounced that, depending
27 on which syllable you stress.

28 At any rate, it seems to me in some context

1 it totally would be inappropriate and it seems to me in
2 the context of this case it would be appropriate, so I
3 will deny that request.

4 13. Reference to the Mission Corporate Category
5 Sort-out, or the activities or conversations associated
6 therewith.

7 MR. LITT: That is in large part these tapes that
8 Mr. Flynn was referring to, but it is our position, and
9 if Miss Sullivan is going to testify we are going to be
10 inserting attorney-client privilege, information that
11 she had was obtained in the context of acting in respect
12 of legal interests involved. It was a mission to deal
13 with various legal matters. That was integrally related
14 with assistance from counsel and advice of counsel on
15 a variety of legal matters.

16 THE COURT: Well, does this all have to do with
17 what was said on the tape in this meeting?

18 MR. LITT: Well, I think that is the heart of what
19 they want to do, although I don't know whether they intend
20 to elicit other information from Miss Sullivan in addition,
21 and if they do, we want to make known there is an attorney-
22 client privilege there as well.

23 MR. FLYNN: It can be very brief if it becomes relevant
24 and at this point in time it is a question in my mind.
25 We will tie it into the documents that Mr. Armstrong was
26 supposedly forced to sign.

27 I should inform the court at this point that
28 Miss Sullivan has testified already before several

1 governmental agencies and there are ongoing criminal
2 investigations involving Mr. Hubbard and her testimony.
3 That evidence of a crime or the commission of a crime
4 or a crime to be committed in the future which, in part,
5 is what is involved in these tape recordings, is not protected
6 by the attorney-client privilege in any situation, but
7 regardless --

8 MR. LITT: Your Honor, this is not relevant.

9 MR. FLYNN: She's already --

10 MR. LITT: Just a moment. This is the fifth time
11 I have had to stand up to object to indirect reference
12 to the contents of these tapes.

13 THE COURT: That might be a separate basis and might
14 not be privileged.

15 MR. LITT: The court has found it is privileged.
16 Mr. Flynn, in order to establish the court rule, has to
17 rely on extrinsic evidence and what he does is he keeps
18 referring to these tapes. He continues through indirection
19 to do it, and it should not be permitted.

20 THE COURT: Let's leave it at this time.

21 At this point you don't intend to go into
22 it. If you intend to go into it with a witness, you should
23 probably take it up outside the presence of the jury before
24 we get to this testimony and have a preliminary ruling
25 on it.

26 14. Use of hearsay articles, reports and/or
27 memoranda containing critical statements concerning the
28 Church of Scientology, the religious movement of Scientology,

1 the L. Ron Hubbard or Mary Sue Hubbard.

2 Do you have any intention of getting into
3 this business?

4 MR. FLYNN: The issue is this, your Honor, on the
5 invasion of privacy count, if the material is already
6 in the public record, then we have the -- I believe under
7 the invasion of privacy cases we have the appropriate
8 defense of showing that the material is already in the
9 public record.

10 Now, you could put a stack of materials 10 feet
11 high in front of the court which relate to the critical
12 statements concerning Scientology and L. Ron Hubbard and
13 Mary Sue Hubbard which is what we would attempt to do.
14 For example, this report to the City of Clearwater is
15 some 40 pages in length with regard to information that
16 is most germane to this case that has a lot of information
17 that is under seal in it.

18 The difference between what is under seal
19 and what was already in the public record to some degree
20 is that most of this material is in Hubbard's handwriting
21 and authenticated as such, and that the organization has
22 been claiming for years that what has been in the public
23 record is false.

24 For example, Mr. Litt said to you yesterday
25 that if the church wrote the dust jacket on these books
26 that it published, then Mr. Hubbard shouldn't be held
27 responsible for it.

28 Well, among the documents under seal, and you

1 will see this from Miss Sullivan, is that Hubbard wrote
2 the dust jacket and the handwritten biographical summaries
3 are written by Mr. Hubbard.

4 THE COURT: In any event, I think we have to wait
5 on this subject to hear what the plaintiff's contentions --
6 what are you going to claim actually on how Mrs. Hubbard's
7 privacy has been invaded, then you are in a position to
8 perhaps defend against it.

9 MR. FLYNN: I agree with your Honor.

10 MR. LITT: I think we have to understand what we
11 are dealing with here.

12 Let me take this one example, the Clearwater
13 report. This report is a report written by Mr. Flynn.
14 Mr. Flynn was hired by the City of Clearwater to investigate
15 the Church of Scientology because the City of Clearwater
16 preferred that the Church of Scientology not be in the
17 City of Clearwater.

18 Extensive legislative hearings put together
19 by Mr. Flynn were held. In these legislative hearings
20 every imaginable derogatory statement about Scientology
21 was made. Legislation proposed by Mr. Flynn was passed
22 and subsequently declared unconstitutional by the
23 United States District Court for the middle district of
24 Florida.

25 MR. FLYNN: That is inaccurate.

26 MR. LITT: That is completely accurate. I will
27 give the court the opinion.

28 THE COURT: I am not going to go down there.

1 MR. FLYNN: It wasn't my legislation.

2 MR. LITT: No, yours was rejected.

3 THE COURT: I don't really -- we are beating a dead
4 horse, but go ahead.

5 MR. LITT: The problem is, your Honor, that if there
6 are documents, the only thing that they can do on the
7 public record is not say all of these things have been
8 said about L. Ron Hubbard or Mary Sue Hubbard. Therefore
9 the documents are not private. That is just not permissible
10 because as long as we are not relying on the privacy of
11 the contents of those documents, then that is irrelevant.
12 Therefore, all they can do is the following: If they
13 have a document that is under seal and that is also in
14 the public records, for example, Mr. Flynn has claimed,
15 and I don't know whether this is accurate or not, that
16 he had from independent sources Mr. Hubbard's Naval records,
17 and that he submitted them to the Clearwater City Commission.

18 These were also among the materials given
19 by Mr. Armstrong to Mr. Flynn.

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1 And, indeed, if they can make the foundational
2 showing, we will stipulate that that particular document
3 under seal was -- a version of it had been publicly
4 disseminated. Other than that, this is not, in any conceivable
5 way, relevant; and this report that he wants to introduce
6 on the theory that you have no privacy because he has made
7 so many claims about you, it is unbelievable. He wants to
8 put in a report that wasn't subjected to any judicial
9 examination, with all of these charges and claims and
10 statements framed by him as evidence in some form in this
11 case, when it can't conceivably go to the privacy issue
12 because the documents are private and the only way that they
13 can show that the documents aren't private is on a document
14 by document basis, by showing that this document is in the
15 public record.

16 So it seems to me that the limitation that the
17 court should impose is that what they can show with respect
18 to public information is simply the issue of whether or not
19 a particular document was in the public record. If the issue
20 is that the Church of Scientology is a public figure, then
21 we can deal with whether or not there needs to be any evidence
22 on that; because I don't really dispute -- I am not stipulating
23 at this point, but that problem can presumably be resolved,
24 if that is the theory of its admissibility.

25 THE COURT: Well, counsel, it seems to me that the
26 only person here that is suing for invasion of privacy is
27 Mrs. Hubbard; and certainly nothing in the abstract would
28 be admissible here until we first find out what Mrs. Hubbard

1 says has invaded her privacy.

2 Then if counsel wants to present something on
3 the theory that this is already in the public domain, I will
4 consider it outside the presence of the jury. Then you will
5 have an opportunity to object and counter it. Obviously
6 a person can't create his own, I suppose, defense on this
7 subject by speaking out on some perceived problem, thereby
8 making it a matter of public record.

9 But there are other things, certainly, in the
10 public record, I am sure, concerning this case. The problem
11 is really what is the plaintiff's contention going to be
12 and what can the defendant, by fair means, attempt to either
13 deny it or contradict it or meet it. So we will deal with
14 that in due course.

15 At this point the motion is granted.

16 Next is a reference to Mr. Hubbard's unavailability
17 or the fact that he is not a witness in this case. Well,
18 I assume the jury will make that determination themselves
19 if he is not called as a witness. But his unavailability,
20 I don't know whether anybody plans to refer to that or not.

21 MR. LITT: Let me explain. I am assuming that -- and
22 I could be wrong -- that Mr. Flynn intends to argue why
23 Mr. Hubbard is not here. The court should be aware that
24 in this probate case that I discussed earlier there was
25 extensive evidence that Mr. Hubbard was in seclusion, and
26 the question was whether he was a missing person. The court
27 made a judicial determination that although his whereabouts
28 were not known to the court that he was entitled to keep

1 his whereabouts unknown as a matter of his constitutional
2 right to privacy.

3 Mr. Hubbard has not been in the public for at
4 least four years now, and what we are raising is simply the
5 argument that may be advanced as to why Mr. Hubbard is not --
6 was not produced. We don't want these claims that he is a
7 fugitive from justice. There is no judicial determination
8 that he is a fugitive from justice. There is no charge pending
9 against him, any criminal charge, anyplace; and we are very
10 concerned that this is going to be one more of the rings
11 of charges that we are going to face, and we do have and
12 can provide to the court the statement of findings by
13 Judge Hennigan that discusses the privacy right of Mr. Hubbard
14 in that regard.

15 We would at least like, before any statements
16 he wants to make in that regard, that they have to be cleared
17 by the court.

18 MR. FLYNN: If I could be heard briefly, Your Honor.

19 First of all, to correct the misstatements in
20 the probate proceeding, the probate proceeding is very narrow,
21 "Is L. Ron Hubbard missing for a particular provision of
22 the California Code?"

23 L. Ron Hubbard submitted a signed sworn affidavit
24 to Judge Hennigan the day before Judge Hennigan was going
25 to rule he was missing. Over a period of some six or seven
26 months Judge Hennigan continually told Mr. Litt that
27 Mr. Hubbard should either make himself available for deposition
28 and/or submit a declaration to the court. And over a period

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1 of six or seven months Mr. Litt failed to do so. The day
2 before the ruling was going to be made, Mr. Litt showed up
3 with a declaration supposedly signed by L. Ron Hubbard saying
4 he wasn't missing. That is the only thing that Judge Hennigan
5 resolved.

6 This reference yesterday to the adjudication
7 of the \$85 million was entirely incorrect. The only
8 adjudication was: He is not missing for purposes of this
9 proceeding because he says he is not missing.

10 With regard to whether he is a fugitive from
11 justice, a California court has already ruled that he is
12 concealing himself from process. So that statement of
13 Mr. Litt is inaccurate. He is a fugitive from justice in
14 France, having been convicted of criminal fraud; and he is
15 currently the subject of several ongoing criminal
16 investigations. So that statement of Mr. Litt is inaccurate.

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1 The issue before the court here is the following:
2 Who owns these documents? Who has the right to possess
3 them on at least the conversion count?

4 Well, Mr. Hubbard has sent a letter to the
5 court in which he says, "Send them to the Church of Scientology
6 International." They want to introduce that in evidence
7 under a state of mind exception to the hearsay rule which
8 Miss Dragojevic will argue to the court to show that it
9 is admissible to show what Mr. Hubbard's state of mind
10 is with regard to who should have the documents. We have
11 been denied all discovery from Mr. Hubbard because he
12 is hiding. We have tried to depose him. We have tried
13 to get judicial approval of the deposition under a particular
14 provision of the California Code, and we have been unable
15 to do so. We were thinking of appealing it, but we haven't
16 at this time.

17 It is not that he is unavailable. The Federal
18 Court has ruled that he is hiding. Under Section 412
19 of the California Code of Evidence there is a provision
20 which relates to a party having power to produce better
21 evidence.

22 Well, the fundamental issue in this case is
23 who should have these documents. It is admitted by the
24 parties that these are Hubbard's documents for the most
25 part. The person who is most appropriate to tell the
26 court or the jury who should have the documents is
27 L. Ron Hubbard. We believe that we should be entitled
28 to a request for instructions to the jury that if they

1 fail to produce Hubbard to testify on that subject, then
2 an inference should be made against them in the evidence
3 that they offer according to the language of the code
4 should be, quote, viewed with distrust because there's
5 already before the court a false declaration on which
6 a preliminary injunction has been issued in this case,
7 and they have already admitted that that declaration,
8 which was the sole basis for Judge Cole to issue the
9 preliminary injunction, was false.

10 Now, they come forward and they say, "Mary Sue
11 Hubbard should have the documents," or that is what she
12 says. But in this supposed letter from L. Ron Hubbard,
13 he never mentioned Mary Sue Hubbard. So we submit that
14 if they don't produce L. Ron Hubbard to say what should
15 be done with his documents, Evidence Code Section 412
16 should allow us the following instruction:

17 "If weaker and less satisfactory
18 evidence was offered when it was within
19 the power of the party to produce stronger
20 and more satisfactory evidence, the evidence
21 offered should be viewed with distrust."

22 So, we submit that the issue of L. Ron Hubbard's
23 unavailability threads through this entire case and, in
24 essence, we are in the position of defending a case involving
25 the documents of a man who Gerald Armstrong worked for
26 and the man hasn't even come forward and said, "I want
27 the documents."

28 THE COURT: Well, I am going to short-circuit this.

1 Time is moving on.

2 It seems to me that the fact that you have
3 been unable to locate him to depose him is something you
4 could present, but he is not a party to this action as
5 such, and so I don't -- and further, of course, I don't
6 think it would be appropriate to go into the possibility
7 of his motivations for not appearing.

8 I doubt that the United States has any treaty
9 obligation with France which would require them to extradite
10 where a person has been tried in absentia. That would
11 be probably contrary to the fundamental principles of
12 American justice. So I don't think that that type of
13 conviction, while it may be very important if he were
14 to surface in France, would be of any particular great
15 moment in the United States. The fact that he may be
16 under investigation by various agencies, of course, that
17 just gets into the area of rumor, suspicion. We don't
18 know what they are doing. We don't know whether -- what
19 his defense might be and so forth, so the fact that he
20 is not available is something that you can refer to. The
21 fact that you made efforts to attempt to subpoena him,
22 to depose him, you certainly are entitled to go into.

23 If, in fact, the person has a constitutional
24 right to privacy and to seclude himself from other people,
25 which is probably something that is true as long as he
26 doesn't violate any law in doing so, certainly no inferences
27 could be drawn from the fact that he chooses to exercise
28 such a constitutional right.

1 The jury can draw their own conclusions. I
2 am sure they may well do so, but be that as it may, and,
3 of course, I could not give such an instruction as you
4 posed, although you may cite it, because he is not a party .
5 to this action and the instruction does not apply to situations
6 even where both parties have, in theory anyway, in legal
7 contemplation the equal right to subpoena a particular
8 witness. Plaintiff can undoubtedly make the same contention
9 that they have been unable to subpoena him, too. It may
10 be the jury may not want to believe that, but be that
11 as it may, it is something that can be touched upon in
12 argument and it is not something that the court can give
13 an instruction when both parties have, at least in legal
14 contemplation, the same equal right to subpoena.

15 So, the motion is going to be denied as it
16 relates simply to Hubbard's unavailability or the fact
17 that he is not a witness. The fact that he is not a witness
18 is going to be obvious and the fact that he is not available,
19 if counsel wants to develop that, can be developed.

20 The plaintiff wants the defendant to make
21 an offer of proof for every witness. Well, I don't think
22 I am going to buy that. There may be some specific witnesses
23 that may be a problem we should go into.
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1 MR. LITT: Let me explain the problem, Your Honor.
2 We will get into this more.

3 Actually the next section of this has to do with
4 limiting witnesses who weren't mentioned in discovery.

5 But the court should understand that the defense
6 that the court has adopted here is not pled in this file.
7 The only affirmative defense that exists is a defense that
8 they were entitled to disseminate, under the First Amendment,
9 information about Mr. Hubbard.

10 The defense that this court has provided permission
11 for is far beyond the pleadings in this case. We have no
12 idea at this point what is being permitted and what is not
13 and what the defendant intends to introduce; and we have
14 no reasonable notice, and we will discuss that problem more.

15 I am willing to defer it, because I think it
16 may best be discussed when we have finished all of the motions
17 and see where we stand at the end. I think that might be
18 a better way to handle the matter; because some of the other
19 rulings of the court, depending on what happens, also implicate
20 this issue. So that would be my suggestion at this point,
21 rather than my continuing to argue it now.

22 MR. FLYNN: My only comment, Your Honor, is that I
23 am defending the case. Unless the evidence goes in, I really
24 don't know who I am going to call as a witness. I don't
25 know what the evidence is going to be yet. We listed them
26 because I understand from Mrs. Dragojevic that under California
27 procedure we have to list the witnesses we may call. But
28 it would be entirely premature, I suggest to the court, to

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1 go into it at this point because I don't even know who I
2 am going to call, because I haven't been able to figure out
3 what their claim is. I don't know what Mary Sue Hubbard
4 is claiming with regard to invasion of property. It is a
5 mystery to me.

6 THE COURT: All right. We will deal with that in due
7 course.

8 MR. LITT: I think the next item, Your Honor, which
9 is also in that same motion is this question of striking
10 witnesses. It is not listed under the subcategories.

11 THE COURT: Striking witnesses? Are we going to hit
12 some witnesses?

13 MR. LITT: It is actually found in our motion on page
14 82.

15 THE COURT: Trial by combat, you mean?

16 MR. LITT: Well, it looks like you are getting your
17 share.

18 THE COURT: Page 82 what?

19 MR. LITT: Page 82 of the subject matter motion.

20 THE COURT: The one we just finished?

21 MR. LITT: Yes, the one you thought we just finished.

22 THE COURT: All right. I will come back to page 82.

23 Okay. This court should exclude witnesses because
24 defendant failed to disclose them through discovery. I thought
25 I saw that somewhere.

26 The only problem with that, counsel, is your --
27 Wasn't that a separate motion?

28 MR. LITT: No. Miss Dragojevic filed a motion,

1 Your Honor, to strike our witnesses on the ground that she
2 propounded the question, "Who are you going to call at trial?"
3 and we said we didn't know. But our motion is different.

4 THE COURT: All right. Let me look again at it, then.

5 I don't have your interrogatories and responses.
6 I am not quite sure when these interrogatories were submitted,
7 what the answers were, whether there is any motion to compel
8 further answers.

9 MR. LITT: There was not a motion to compel further
10 answers. They answered the questions.

11 THE COURT: What was the question? What was the answer?
12 Give me the exact words.

13 MR. LITT: The question was, "Identify all witnesses
14 having knowledge about the causes and occurrences set forth
15 in the complaint." And it was done two months before trial.

16 There were other more specific ones which they
17 objected to; and because we were too close to trial, we were
18 not able to compel. But this question was answered by them
19 and it listed nine people, only two of whom are on their
20 witness list. And the thing that I think is of particular
21 note for us is that the question asked for the causes and
22 occurrences. We were basically just trying to get a list
23 of who we potentially had to deal with in the case.

24 Now, the theory of the defense that has been
25 put forward here today is that --

26 THE COURT: Do you want to give me that question again?

27 MR. LITT: Yes. "Identify all witnesses having
28 knowledge of the causes and occurrences set forth in the

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1 complaint."

2 THE COURT: You didn't ask him about the answer?

3 MR. LITT: No, it was not an inquiry about the answer.
4 It was an inquiry about the complaint.

5 Remember, the theory that has been put forward
6 here is that Mr. Armstrong did this because his state of
7 mind was thus and such and he knew this and he knew that,
8 and this witness is going to corroborate this and this witness
9 is going to say that.

10 The question that we asked specifically asked
11 for the reasons that he did what are set forth in the
12 complaint.

13 THE COURT: If you can read that into it -- I don't.
14 If I had been sitting in law and motion and they had objected
15 to that, I would have sustained the objection. It is just
16 overly broad.

17 If you want to ask them as to a particular
18 paragraph or a couple of paragraphs, whether people have
19 knowledge of these facts, that would be one thing. But the
20 causes and occurrences in the complaint, when you have got
21 multiple causes of action by two different parties, I don't
22 think anybody should be required to just answer that in any
23 fashion.

24 MR. LITT: They did answer.

25 THE COURT: You are asking for sanctions here.

26 MR. LITT: No. What I am asking for --

27 THE COURT: Exclusion of people who were not identified.

28 MR. LITT: Something has to be done, Your Honor. The

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1 defense that the court has adopted here was not pled. These
2 witnesses were not named in discovery. They were not named
3 in response to that interrogatory question. They were not
4 named as having knowledge by Mr. Armstrong about any of the
5 occurrences in the complaint.

6 We are now in a situation where, in the course
7 of discovery, none of these have been disclosed and,
8 furthermore, the affirmative defense -- much of what the
9 court has ruled is in issue in this case has not been put
10 in issue by the pleadings because the public policy affirmative
11 defense that was asserted was essentially a First Amendment
12 defense, which was asserted essentially to the equitable
13 claim and argued around the preliminary injunction to begin
14 with and lost; and we are now in a posture in this case --
15 and I am not sure of what I am suggesting to the court --
16 where if the court is not prepared to strike the witnesses,
17 then other relief we might request I would just defer. But
18 I do want the court to be aware of the problem from our point
19 of view.

20 There is a substantial problem in terms of our
21 having notice of what we had to deal with in this case.

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1 THE COURT: Well, Mr. Dragojevic, you want to respond
2 to that?

3 MISS DRAGOJEVIC: Yes, your Honor. I'd like the
4 court to know that I looked through all of your answers
5 to interrogatories and wrote a list that came out with
6 40 witnesses that we listed throughout the answers to
7 interrogatories as individuals who had knowledge of various
8 claims. 29 of these people were listed on our witness
9 list, so when Mr. Litt indicates that we didn't disclose
10 these witnesses during discovery, that is inaccurate because
11 they were listed in answers to interrogatories. Even
12 though they weren't listed in the answer to that one specific
13 interrogatory, they were throughout our answers to various
14 interrogatories.

15 MR. LITT: Well, I would just point out that by
16 her own admission, 21 were not.

17 THE COURT: Well, of course, you asked about the
18 complaint. I don't know about the answer. There may
19 have been things that deal with the answer here.

20 Also, of course, one of our trial setting
21 conference orders is that they disclose the witnesses.
22 I guess they disclosed everybody conceivable to avoid
23 the possibility of sanctions being applied for not complying
24 with trial setting conference orders. I see this every
25 day. Because they are afraid of being caught without
26 being able to call a witness, they list every conceivable
27 witness.

28 That presents a problem if you want to start

1 deposing people, but that goes to the character, I suppose,
2 of our order. Well, obviously I don't -- I am not really
3 sure. This was an expedited case. It isn't a situation
4 where the parties have had five years to prepare for trial.

5 All I can suggest, counsel, I am not going
6 to make any blanket order precluding witnesses. If they
7 call some witness that you feel presents an element of
8 surprise, if they don't appear to you to have any knowledge,
9 approach the bench and we can discuss it. Maybe counsel can
10 make an offer of proof if the court feels it is appropriate
11 at that time.

12 So, I am not sure what the motion was. Motion
13 to strike, I guess, is denied.

14 Well, we have a couple of other motions by
15 the plaintiff. Intervenor's motion in limine regarding
16 admission of a prior felony conviction; is that one that
17 we should take up next?

18 MR. LITT: That is fine, your Honor.

19 THE COURT: I have read -- go ahead.

20 MR. LITT: Oh, that is all right.

21 THE COURT: I was going to say I have read it, the
22 motion. My disposition would be that I will accept the
23 premise that Beagle applies to civil cases and Proposition 8
24 does not affect civil litigation. It seems to me this
25 particular type of a felony would be one which does relate
26 to honesty and integrity, and that it would be a proper
27 felony for impeachment purposes under Beagle.

28 Generally speaking, you can only -- that is,

1 the person who is offering it can only go into the fact
2 of the conviction, the date and the general nature of
3 the conviction. If the other side wants to develop more
4 in detail, they may do so in litigation.

5 I don't know. Counsel did mention yesterday
6 that one of the reasons for what occurred was that Mrs.
7 Hubbard was apparently no longer available because of
8 the fact that she was confined.

9 MR. LITT: That is not so, your Honor.

10 THE COURT: I mean, that is a factual matter. I
11 don't see any problem with letting that evidence in if
12 they are going to know about the conviction anyway, that
13 she was in custodia legis and unavailable.

14 MR. FLYNN: No, she wasn't actually in prison at
15 that point. What happened is this: Because of her conviction,
16 she was removed by her husband from post so the key fact
17 that occurred was the following: She proved initially
18 that Mr. Armstrong notwithstanding her present testimony
19 could get the documents, and we have this petition with
20 her handwriting on it.

21 Subsequently there were more documents that
22 were given to Mr. Armstrong, and the person who sent the
23 petition in then sent this to the person who was in the
24 post that Mary Sue Hubbard had been in. So, Mr. Armstrong
25 got permission -- the post is called Controller.
26 Mr. Armstrong got permission from the successor to
27 Mary Sue Hubbard.

28 Now, Mary Sue Hubbard is coming forward --

1 we are not trying to introduce the evidence on that point
2 to show she was in custody. We are trying to introduce
3 the evidence to show simply the nature of the conviction,
4 the fact and the date for impeachment purposes, but with
5 regard to the other issue, which is a totally separate
6 issue as to whether or not Mr. Armstrong had approval
7 to give more documents to Mr. Garrison, which Mary Sue Hubbard
8 is claiming he didn't have authority to do, our position
9 is that she wasn't even in a position to give or not to
10 give approval at that point in time. That it had nothing
11 to do with her husband. She had been removed from her
12 post. That was the cross-reference.

13 Now, in any event, I had further stated that
14 because she was no longer involved because she had been
15 convicted and for that reason removed from her post, she
16 was not in a position to possess the documents which I
17 think the evidence is going to be very clear on. She
18 had no control or right of possession of any nature or
19 description once she was removed because of the conviction,
20 and that our position is very clear and therefore she
21 has no right in this courtroom to come in and assert that
22 she owns or has the right to possess the documents because,
23 in fact, the evidence is to the contrary.

24 In fact, when they got their preliminary injunction,
25 they said that they owned the documents and then she came
26 in and asserted a contrary interest.

27 THE COURT: Well, it seems to me that is something
28 the jury is going to have to determine, I suppose. But

1 it seems to me -- do you have something further you want
2 to add to it?

3 MR. LITT: Well, I want to point out one thing that
4 was not really argued in our motion, which is in light
5 of this defense which I have trouble quite defining, but
6 in light of this defense somehow public interest and
7 Mr. Armstrong's state of mind constitutes a defense and
8 with the information that Mr. Flynn has clearly indicated
9 he is going to use, the fact -- if Mrs. Hubbard who, as
10 I will explain, is going to testify on very limited matters.

11 If the court permits the use of this prior
12 conviction to impeach her, especially in the context of
13 this defense, what will really happen is that the fact
14 of conviction will be used to force the theory substantively
15 that is being put forward here that this is a criminal
16 organization against whom it was all right for Mr. Armstrong
17 to act criminally which seems to be the defense, and this
18 brings it much more so than when we first framed the issues
19 in our papers into the area of causing problems in terms
20 of in a criminal case before Proposition 8 where someone
21 is charged with a crime and you try to use a prior offense,
22 similar offense for impeachment purposes.

23 In reality, given their theory here and given
24 now what the defense in the case is, allowing that to
25 be used will clearly have that effect and the court should
26 understand that the credibility issues here with respect
27 to Mrs. Hubbard are extremely limited.
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1 Mrs. Hubbard does say that she did not realize
2 that Mr. Armstrong had these documents; however, she does
3 not contend that in the totality of circumstances he was
4 unauthorized. She is not claiming invasion of privacy against
5 him for having taken the documents from the controller's
6 archives and putting them in the archives of the Church or
7 from taking them from the archives of the Church and giving
8 them to Omar Garrison. She is claiming it from taking them
9 from Omar Garrison and giving them to Michael Flynn.

10 So that the questions of whether or not
11 Mr. Armstrong was entitled to take these documents are not
12 in issue in the case. We are not claiming that while he
13 was in the Church Mr. Armstrong couldn't get the documents
14 he got and couldn't give them to Mr. Flynn.

15 The complaint has to do with what he did after
16 he left the Church. Therefore, all of these conflicting
17 facts that Mr. Flynn refers to we are not putting in issue.
18 It will only come in to issue if they bring it up. So there
19 is no credibility on that.

20 Mr. Hubbard has admitted that the documents are
21 Mrs. Hubbard's. There is no factual issue on that, and the
22 damages claimed -- we are not claiming any damages beyond
23 the normal damages that a person would suffer under
24 circumstances such as these. So that, in fact, the credibility
25 issues regarding Mrs. Hubbard, in terms of the testimony
26 that we intend to put forward by her, do not -- they really
27 don't relate to any significant disputed facts.

28 In light of that and in light of the extraordinary

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1 potential for prejudice attendant upon asking her about her
2 conviction, in light of the evidence that the court is going
3 to allow in on this defense, we would like the court to
4 reconsider because I think there are circumstances beyond
5 what were originally defined in our motion.

6 THE COURT: Miss Dragojevic.

7 MISS DRAGOJEVIC: Yes, Your Honor. Contrary to what
8 Mr. Litt has just indicated, there are significant disputed
9 facts with respect to Mrs. Hubbard's testimony. Just from
10 her own declaration and from her deposition testimony, she
11 testified that Mr. Armstrong had no authority to use the
12 documents in question, that she never gave him permission
13 to copy or gain access to the documents, that he had no
14 agreement with Mr. Hubbard regarding his personal storage
15 and the use of documents from his personal storage.

16 So what Mr. Litt is saying, that there is no
17 significant dispute of facts, is totally inaccurate. We
18 intend to call Mrs. Hubbard, and we intend to question her
19 about these representations that she has made under oath;
20 and I believe that we will be able to impeach her credibility
21 with documents that we have, which we intend to use, and
22 with the testimony of other witnesses to show that her
23 inconsistent testimony goes directly to her credibility and
24 that the felony for which she was convicted also goes directly
25 to credibility as well.

26 So I would disagree with Mr. Litt's interpretation
27 of what Mrs. Hubbard's testimony has been throughout the
28 discovery in this case, and I would indicate that the court's

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1 ruling is correct and that the admission of a prior felony
2 conviction should come in.

3 THE COURT: It seems to me that we are not just trying
4 Mrs. Hubbard's case in a vacuum. We are trying the case
5 of the Church, also, versus Mr. Armstrong; and while she
6 may say things in her testimony and limit her testimony in
7 an attempt to narrow down what she is testifying to, this
8 is a civil action and she is a witness to, I gather, a number
9 of matters that deal with the church's case as well against
10 Mr. Armstrong.

11 It seems to me that balancing the different
12 interests that that is a proper area of interest or concern
13 to the trier of fact; and, of course, it would be subject
14 to a limiting instruction. They can consider that only for
15 the purpose of testing the witness' credibility.

16 It seems to me, further, that, of course, the
17 court could, I suppose, say, "I will take it under advisement
18 and we will reconsider it later on."

19 It seems to me if it is likely that it is going
20 to get into evidence counsel's better attack is to certainly,
21 with a jury, meet it head on and voir dire the jury on this
22 subject. I have tried a lot of criminal cases as a lawyer,
23 defense lawyer; and before Beagle felony convictions were
24 always admissible, and we just took it head on. We would
25 just voir dire the jury about it, whether that would prejudice
26 them against the client. And my experience was, of course,
27 you could be overwhelmed by priors; but if you hit it head
28 on and if you had any kind of a case, the jury tended not

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1 to pay a whole lot of attention to that, tried to judge the
2 case on its merits and not be prejudiced.

3 Then, every lawyer has their own way of trying
4 a case. I think it is something that in this case is relevant
5 and it goes to credibility and it is part of the total picture.
6 So I will permit counsel to go into that.

7 Trial motion to compel responses to requests
8 for admissions and requests for admissions of genuineness
9 of documents. I am not going to get involved at this late
10 date in an order compelling discovery. Plaintiff sought
11 an expedited trial date, and it seems to me that doing that
12 he has to give up some of his --

13 MR. LITT: I would like to make one point on that,
14 Your Honor --

15 THE COURT: Yes.

16 MR. LITT: -- which is that the court should understand
17 that the reason we could not move to compel that before the
18 law and motions court is that we gave an extension to the
19 defendant to answer these based on the understanding that
20 they would be answered.

21 The defendant asserted Rule 333, which was no
22 longer in effect, saying that the questions were out of time,
23 which they were not under the new Rule 222. But because
24 we had given them the extension, we could not move and we
25 were not able to get an order shortening time. We could
26 not move on 15 days' notice. We could have done that had
27 we not given the extension, and we gave the extension based
28 on the understanding that they were going to answer the

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1 requests to admit which were not out of time under the current
2 rules.

3 We basically feel that it was simply unfair,
4 and that is the reason that we have suggested it here. We
5 feel that the issues in the case could be substantially
6 narrowed. My understanding is that the answers were prepared,
7 in fact, by the defense and then they realized that they
8 could raise this out of time claim. And we just think it
9 was unfair and that the court has discretion to determine
10 that under all of the circumstances that they should answer
11 it. And it could substantially narrow the issues in the
12 trial, because much of our case is based upon the testimony
13 of Mr. Armstrong; and if these requests to admit the
14 genuineness of the documents are dealt with, much of the
15 case could potentially be put on through such requests.

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1 THE COURT: Well, what about that?

2 MS. DRAGOJEVIC: Your Honor, this issue has already
3 been litigated before Commissioner Stoutt. We appeared
4 before him on an order shortening time so that they could
5 get this motion heard. They put before him the same exact
6 argument which they put before this court, and he indicated
7 that they did not have sufficient good cause for the order
8 shortening time to get their motion heard.

9 The fact that I have indicated that we have
10 answers prepared is not accurate. I never indicated that
11 we have answers prepared. I indicated to Commissioner
12 Stoutt that we would have extensive objections to the
13 request for admissions and the request to admit the genuineness
14 of documents. I have never indicated to anyone that we
15 had the answers prepared.

16 These responses would have been due since
17 they were served on February 1st, they would have been
18 due on March 1st. At that time we had a trial date of
19 March 22nd. Commissioner Stoutt felt that they had placed
20 themselves in the position where they had put themselves
21 against the clock and against the wall, and that I shouldn't
22 have to respond to these things, so this has already
23 been before the Commissioner and he has made a rule on
24 it and he is aware of Rule 333 and what it provides for
25 and still indicated that the motion would not go forward.

26 THE COURT: Well, I am disinclined to get involved
27 in discovery at this time. After all, people are here.
28 They are trying to get their case ready for trial.

1 If they had to devote themselves to dealing
2 with all of these problems and then coming back and arguing
3 further on it, I think it would take longer to do than
4 to probably try the case.

5 Motion is denied.

6 There is a request to take judicial notice
7 or to hold evidentiary hearings that Scientology is a
8 religion. Now, at this point I don't really know what
9 the significance of this would be. Why we would -- I
10 have indicated there is plenty of case authority indicating
11 certainly that prima facie the Church of Scientology of
12 California is a religious institution and I have no idea
13 or understanding that the defense is going to actually
14 attempt to show that they are not.

15 MR. FLYNN: I won't, your Honor. I think that will
16 obviate the issue.

17 MR. LITT: No, it doesn't obviate the issue.

18 It is important, both in terms of the foundation
19 for the court's rulings on the First Amendment issues
20 that there be a determination of religiosity because we
21 have a substantial First Amendment issue in this case
22 which is bottomed on the status of the Church of Scientology
23 as a religious institution and the status of Scientology
24 as a religion, both of which are entitled to the protection
25 of the First Amendment.

26 Secondly, we intend to introduce evidence
27 that L. Ron Hubbard is the founder of the religion of
28 Scientology. We don't intend to introduce evidence that

1 it is a religion, but we want the jury to be informed
2 that it is a religion.

3 If Mr. Flynn wishes to stipulate for purposes
4 of this case that it is a religion, that is fine. If
5 the court wishes to take judicial notice of it in the
6 absence of Mr. Flynn's presenting any contrary evidence,
7 that is fine. But I think we are entitled to the determination
8 for purposes of this case at least.

9 MR. FLYNN: I don't think it is an issue in the
10 case, your Honor. I don't intend to stipulate to it.
11 I don't want to go into any lengthy evidentiary hearing.
12 I don't intend to introduce any evidence that they are
13 not.

14 If they introduce evidence that L. Ron Hubbard
15 is the founder, I will introduce evidence that L. Ron Hubbard
16 says he is not the founder. It is that simple. Whether
17 they are a religion or not is an extremely complicated
18 question that needs not even concern this court and even
19 perhaps the more complicated issue under the laws of most
20 states is whether they operated as a religious organization.

21 You can have a group of people that subscribe
22 to a collection of beliefs, and they can theoretically
23 be "a religion," but whether the corporation organization
24 that is embodied within those groups of people operated
25 as a religious organization, which is the subject of extensive
26 litigation involving the IRS and other jurisdictions,
27 is an altogether different issue. But I don't believe
28 the court is even involved in the issue.

1 I will introduce no evidence that they are
2 not a religious organization.

3 MR. LITT: Your Honor, one of the opinions there
4 is an opinion by the United States District Court from
5 the Central District of California. Mr. Flynn and
6 Miss Dragojevic represent the plaintiffs in that case
7 on summary judgment, not even on the evidentiary hearing
8 which is the real standard, but on summary judgment where
9 the issue was contested. The court found that Scientology
10 was a religion.

11 We have given the court also the Australian
12 opinion which relies extensively on the United States
13 First Amendment cases which all the way up to the Australian
14 courts Scientology was held by lower courts to not be
15 a religion, and the unanimous opinion by the high court
16 of Australia it was found to be a religion.

17 We feel that it is important that there be
18 a determination of this issue for purposes of this case,
19 both in terms of framing the defenses and also because
20 we are entitled to have the jury instructed on that and
21 we are going to be asking for jury instructions.

22 Keep in mind what has been allowed to be brought
23 into this case.

24 THE COURT: You don't have to remind me. I have
25 been sitting here for a day and a half.

26 MR. LITT: We are not going to be trying religious
27 doctrine. The court has already ruled on that. There
28 is going to be a whole series of supplemental jury

1 instructions on the First Amendment on this case at this
2 point, and we are clearly entitled through whatever procedure
3 the court wishes to follow but we are entitled to a resolution
4 of this issue and we are entitled to it by the court.

5 THE COURT: Well, I will take judicial notice of --
6 whatever your attachments are. You have a case of the
7 Church of Scientology of California, U.S. Court of Appeals,
8 District of Columbia Circuit.

9 You have got an exhibit 2, but there is
10 nothing there.

11 MR. LITT: There is not?

12 THE COURT: I don't know what exhibit 2 is.

13 MR. LITT: I am sorry about that.

14 THE COURT: Exhibit 3 is something from the U.S.
15 District Court, Judge Marshall. Attached to that maybe
16 there is something -- we have a high court of Australia.
17 I can't take judicial notice of that.

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1 MR. LITT: I am asking --

2 THE COURT: It is not certified, and I don't know
3 anything about it. But I will receive those as evidence
4 in this case on this issue. There is no contrary evidence.
5 So I will find that on the evidence presented to me that
6 plaintiff here is a religious institution.

7 Does that satisfy you?

8 MR. LITT: That is satisfactory, Your Honor.

9 THE COURT: I think that is all of the plaintiffs'
10 motions. Now we have some defense motions.

11 Okay. I will take up the motion to preclude
12 use of witnesses not disclosed in discovery, memorandum of
13 points and authorities -- it's time to take a recess. I
14 have to look at the clock once in a while. I will see you
15 at 1:30.

16 MISS DRAGOJEVIC: Your Honor, we are going to waive
17 that motion.

18 THE COURT: It is a good thing you waived it. I was
19 going to deny it.

20 (At 11:57 a.m., a recess was taken
21 until 1:30 p.m. of the same day.)
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1 LOS ANGELES, CALIFORNIA, FRIDAY, APRIL 20, 1984, 1:31 P.M.

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4 THE COURT: All right. Well, the defendant's motion
5 to preclude is withdrawn, so set that one aside.

6 MR. LITT: Your Honor, before we go on to the next
7 defendant's motion, there was one area that we discussed
8 and the court said to reserve until the end of the motions
9 in limine that we were making. That had to do with this
10 issue of the marital agreement between Mr. and Mrs. Hubbard.

11 This marital agreement, I have never seen
12 it, but as I understand it the marital agreement is an
13 agreement that says that in the event, the desire of one
14 party for a divorce, the other party will give them a
15 divorce. That was 31 or 32 years ago, '3 years ago, whatever,
16 and not make any property claims. The Hubbards remain
17 married.

18 The agreement is really nobody's business.
19 It has no probative value, and we would like an order
20 excluding the agreement.

21 THE COURT: Do you have any intention of offering
22 it, counsel?

23 MR. FLYNN: Well, first of all, that is not what
24 the agreement says. The agreement says that Mary Sue Hubbard --
25 it is strange language. I don't know whether Mr. Hubbard
26 drew it or someone else drew it.

27 But it says that she has no claim to any of
28 his property. Secondly, there's been extensive litigation

in other jurisdictions as to whether or not Mary Sue Hubbard
and/or L. Ron Hubbard are residents of the State of
California with regard to the community property provisions
of the State of California.

24-1

1 They have taken the position in these other
2 jurisdictions that Mr. Hubbard is a nomad and is stateless
3 for purposes of jurisdictional questions that have arisen
4 elsewhere. Since he is stateless by their own admissions,
5 we contend that there is no property claim that she has in
6 his property; and since it is pretty much admitted that almost
7 all of this material is his property, we think that that
8 is probative on the issue of whether or not she can make
9 any claim to it.

10 The marital agreement would be additional probative
11 evidence of that, that she has no claim to his property.
12 So for that limited purpose we submit that it is admissible.

13 MR. LITT: There are mutual agreements, Your Honor.
14 One was signed by Mr. Hubbard; one was signed by Mrs. Hubbard.
15 They are identical agreements. Mr. Peterson has seen both
16 of them. They are both under seal. They just have no
17 relevance.

18 After 30 years of marriage, to contend that the
19 joint property collected in the course of the marriage is
20 somehow not joint property on the theory that if someone
21 wants a divorce, which no one does, they can't make a claim
22 to the other's property is -- I don't know what it establishes.

23 THE COURT: I don't know. It is hard for me to evaluate
24 this without actually knowing the precise language and context
25 within which it is used. It may be that they are speaking
26 in terms of what they start out with at the time of marriage
27 and not with relationship to after-acquired property. I
28 just don't know whether they are each waiving any rights

1 in futuro. In order for that contract to be valid in
2 California, certain requirements have to be met.

3 Certainly without some type of preliminary hearing
4 to determine its validity, lawfulness and relevancy, there
5 should be no reference to it. I would have to see the
6 agreement.

7 Was it adopted purportedly in California or some
8 other place?

9 MR. FLYNN: See, the problem is: Mr. Litt has gone
10 into Florida and Massachusetts jurisdictions claiming there
11 is no community property interests between the Hubbards to
12 defeat jurisdiction.

13 MR. LITT: I haven't claimed that, Your Honor. Do
14 we want to get into this?

15 We claimed very simply that it cannot be
16 established that Mr. Hubbard has a domicile in any state
17 and that, therefore, diversity jurisdiction does not lie,
18 period. That's all.

19 THE COURT: I think that property in California, under
20 the public policy of the State of California, held by married
21 people is ordinarily treated as community property or quasi-
22 community property, which is California's determination that
23 that is the way people will hold property if they are married,
24 if they have it in California or if they have property in
25 other states over which the California court has in personam
26 jurisdiction over the other parties for the purposes of
27 dividing property at times of divorce and so forth, without
28 any kind of in rem jurisdiction of property in some other state.

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1 We are talking about property that is in
2 California and held by one of the spouses, and most of
3 these old prenuptial agreements that I have ever seen
4 when they got to court were usually held to be invalid
5 for one reason or another.

6 As I say, we are not seeing it and hearing
7 what the circumstances are and checking the law regarding
8 prenuptial agreements.

9 I'd have to say don't get into it without
10 coming up here and discussing it and we will see what
11 it is all about.

12 MR. FLYNN: Fine, your Honor.

13 THE COURT: Now, the motion in limine to exclude
14 the letter of February 3rd.

15 Well, I don't know what the contents of the
16 letter are. Nobody furnished a copy of it.

17 MR. LITT: I realize that. I have a copy for the
18 court.

19 THE COURT: Can you give it to the clerk and let
20 me see what it is all about.

21 MR. LITT: The court has three pages there. The
22 top page is a typed version of the letter. The bottom
23 two pages are a Xerox of the letter itself, handwritten.

24 THE COURT: Okay, let me see it.

25 Well, I will read it into the record:

26 "Presiding Judge.

27 "Los Angeles County Superior Court

28 "Los Angeles, California

1 "3 February 1983

2 "Your Honor:

3 "I+ has come to my attention that
4 in a legal proceeding in Los Angeles Superior
5 Court many of my personal letters, manuscripts,
6 military and other historical records concerning
7 me or alleged to concern me have been impounded
8 by the court due to a question of rightful
9 ownership.

10 "Some years ago I loaned to the Church
11 of Scientology many of my personal papers
12 and entrusted them with the custody of
13 these. Many documents were held by me but
14 due to the fact that my writing and research
15 over the past several years has precluded
16 my establishment of any permanent residence,
17 I was too short of space in my baggage
18 to retain them and entrusted my personal
19 papers and such to the Church of Scientology
20 for safekeeping and storage.

21 "I hope I have set the record straight
22 and would sincerely appreciate your assistance
23 in assuring that my belongings are returned
24 to the church or their legal representatives.

25 "Sincerely,

26 "L. Ron Hubbard."

27 With a copy to the president of the Church
28 of Scientology, Int.

1 Well, I don't know what the plaintiff would
2 want to offer this for. Certainly, so far as the issues
3 involved in the tort counts, assuming that a foundation
4 of authenticity could be established, it is hearsay as
5 to what he did some time in the past, and it would not
6 be admissible.

7 So far as the issues that might be concerned
8 with the dealings with the equity proceedings, it seems
9 to me it would be probably relevant to show his present
10 state of mind as to what he'd like to have done with them.
11 To that extent, that is something the court would be willing
12 to consider, but that would be the only purpose for which
13 it could be received and that would only be in relation
14 to the decisions the court would have to make on the equity
15 case in the jury trial.

16 MR. LITT: Your Honor, on the damages claim and
17 on the equity claim, too, I suppose, the defendant contends
18 that he had a contract with Mr. Hubbard. He evidences
19 that contract by a one-line response to his petition.
20 It is not a contract, but that is his theory, which says,
21 "Fine. Take this post, good luck," or something like
22 that.

23 But he is contending that he had a contract
24 with Mr. Hubbard. This letter is relevant as to
25 Mr. Hubbard's state of mind at the time that the documents
26 were entrusted to the church as to whom they were entrusted.

27 THE COURT: Hearsay for that purpose.

28 MR. LITT: No, it is his understanding.

1 THE COURT: Don't tell me "no."

2 I said it is hearsay. You can say you don't
3 believe it is or you would urge that I not so find, but
4 I am telling you it is hearsay.

5 MR. LITT: I understand it is hearsay. What I am
6 suggesting to the court is that it is an exception to
7 the hearsay rule as to his state of mind.

8 THE COURT: Not as to something that transpired
9 some years before. It would be a clearly hearsay purpose
10 to show that he at some time before loaned the Church
11 of Scientology any of these personal papers and entrusted
12 them for safe custody. If you are talking about a state
13 of mind when he wrote this as to what he wants to do with
14 these papers, fine. That would be something that doesn't
15 deal with something that transpired years ago over which
16 there is no opportunity to cross-examine and so forth.

26-1

1 MR. LITT: Your Honor, under Section 1252 of the Evidence
2 Code, "Evidence of a declarant's state of mind, emotion or
3 physical sensation at a time prior to the statement is not
4 made admissible if the declarant is unavailable as a witness,
5 and the evidence is offered to prove such prior state of
6 mind, emotion or physical sensation when it is itself an
7 issue in the action."

8 We are --

9 THE COURT: His state of mind is nothing unless it
10 is dealing with whether he loaned to the Church of Scientology
11 his personal papers and didn't enter into a contract with
12 Mr. Armstrong. That's clearly hearsay. That isn't just
13 to show a state of mind. It is to show that he didn't do
14 these things. Produce him and he can testify to it.

15 MR. LITT: In order to have a contract, Your Honor,
16 you must have a meeting of the minds. Therefore, if
17 Mr. Armstrong is going to contend, as he does, that
18 Mr. Hubbard's written response to him constitutes a contract,
19 then in terms of a statement made now as to his understanding
20 of what he did with the documents in the past, his state
21 of mind -- I am not saying whether it is true or not; but
22 as to his understanding, he reflects in the letter his view
23 that what he did was entrust these to the Church.

24 Since the defendant is contending that there
25 was a contract, which requires a meeting of the minds,
26 Mr. Hubbard's then existing state of mind is relevant. This
27 is a statement concerning his past state of mind, and it
28 seems to me that under that theory, and only for that purpose,

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1 it would be admissible.

2 THE COURT: It doesn't deal with state of mind. It
3 deals with whether or not he loaned to the Church of
4 Scientology these papers or whether he did something else
5 with them, and that is clearly a hearsay purpose. You can't
6 say that from this you must conclude that some time ago he
7 had a lending state of mind as distinguished from a contracting
8 state of mind. That isn't what we are talking about.

9 There is no way that this can come in without
10 being used for a hearsay purpose, and that would not be proper;
11 and I wouldn't receive it on these tort causes of action.

12 So that issue will be granted.

13 MR. LITT: That is on the damages claim only, I take
14 it?

15 THE COURT: Yes, on the tort causes of action. So as
16 far as the problems that I have to deal with about what I
17 want to do with these records, it certainly would be relevant
18 as to his state of mind as to these papers and what he wants
19 done with them. The extent to which the court is going to
20 be influenced will depend upon all the other evidence that
21 is presented.

22 MR. FLYNN: Your Honor, just on that last point, we
23 would be prepared to show at the appropriate time that he
24 is not unavailable, that he is in daily communication with
25 the people that are running this lawsuit.

26 THE COURT: Well, obviously there would have to be
27 a foundation laid for its admissibility. I am assuming,
28 without saying it is or isn't, they can lay the foundation.

26-3

1 Notice for motion for leave to amend answer,
2 declaration of Miss Dragojevic. On these matters my tentative
3 decision would be to -- I don't know whether anybody is aware
4 of it, but apparently I struck, when I was sitting in law
5 and motion one day, the answer of the defendant to the
6 intervenor as to that subject. I gather it was just because
7 it was a bare conclusion, it was asserted; and I gather there
8 was never any amendment. But be that as it may, as to the
9 tort causes of action, I don't really think it is particularly
10 appropriate.

11 At the same time, as far as the equitable action
12 is concerned, whether it is amended or not, I think all of
13 this would be before the court in a sense because the court
14 has to determine what is fair and what is just.

15 Does anybody want to be heard further on that?

16 MR. FLYNN: Your Honor, I don't believe we added anything
17 on the tort causes of action. On the equitable, I think
18 Your Honor's last observation is basically the nature of
19 the situation.

20 MR. LITT: Well, let me start by saying I am not clear
21 what the indication from the court was.

22 THE COURT: Okay. What I am saying is: Even though
23 unclean hands arose out of equity, it can be asserted as
24 a defense to a legal cause of action in law in this state
25 at this time. All I am saying is: I don't think that I
26 would permit it to be asserted against the tort causes of
27 action; but since the court will have to deal with the
28 injunction, it seems to me that all of this is going to be

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1 before the court anyway, and it almost doesn't require an
2 amendment as far as what evidence is going to be presented.

3 MR. LITT: Your Honor, we have --

4 THE COURT: I am probably disposed to permit it to
5 be pleaded because I can't see that there is any prejudice,
6 because the court is going to have to deal with what is fair
7 and equitable on the injunction, anyway.

8 MR. LITT: Well, there is substantial prejudice, Your
9 Honor, which goes to the whole way that the issues have now
10 been framed in the case.

11 The striking of the unclean hands defense
12 eliminated precisely the issues that the court is referring
13 to, since it was the only affirmative defense pled that could
14 potentially get into these issues. That is one problem.

15 We consider that the approach that allows unclean
16 hands to be pled is prejudicial. Furthermore, we think it
17 is not permitted under the law. The claims here concerning
18 the shredding, which is what was originally put forward as
19 the basis for unclean hands, does not have to do with the
20 issues in this case. We have already quoted to the court
21 Mr. Armstrong's testimony that the events of the alleged
22 shredding occurred more than two years prior to the issues
23 in this complaint.

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1 THE COURT: Well, I am not impressed with that as
2 any kind of a basis for an unclean hands defense. My
3 conception would have to be the idea that if there was
4 anything that was done in a physical sense to attempt
5 to retrieve these documents that was tortious or criminal
6 or -- it seems to me that would be more in the nature
7 of what I would consider the appropriate clean hands defense
8 as to retrieving the records.

9 In other words, if the people have a dispute
10 and then go to court and seek to obtain their property
11 back through the civil processes, I think that that is
12 appropriate. If they seek to use self-help in the sense
13 that they go out and harass somebody, and I am not saying
14 it was done. I am saying this is taking the defense evidence
15 that they have harassed or threatened or intimidated or
16 thought to be intimidated, then I think that that goes
17 to the question of clean hands in that respect.

18 It goes to the question of the extent to which
19 I think the court should consider equitable relief.

20 MR. LITT: Well, the only thing I can say to the
21 court in that regard is that we have never considered,
22 given the pleadings in the case and the rulings striking
23 these answers, that that was a defense in this case. We
24 have not prepared the case on that basis, and we do believe
25 that it constitutes prejudice to us.

26 MR. PETERSON: May I be heard on that just a moment?

27 THE COURT: Sure.

28 MR. PETERSON: Part of the reason why Mr. Litt was

1 designated by the church, which is my client, I have
2 represented the church all along in this matter and in
3 other matters, too, but in reviewing the case specifically
4 on the unclean hands defense, this is about, I think,
5 the fourth time that this unclean hands defense has arisen.

6 It came in the first answer. We moved to
7 strike it. The court struck it. They asked for a recon-
8 sideration, I believe. The Judge says -- he struck it
9 again.

10 Mary Sue Hubbard filed her cross-complaint.
11 There was a -- her complaint in intervention, I should
12 say, where unclean hands was raised. The court, that
13 may have been the time you struck the unclean hands defense.
14 It was struck then.

15 THE COURT: Well, with leave to amend. I don't
16 think it was ever amended.

17 MR. PETERSON: At one time it was granted without
18 leave to amend, and then again about three weeks ago,
19 Miss Dragojevic brought it as part of an ex parte order
20 shortening time, and the court again denied that opportunity.

21 So, after having it denied four times, the
22 church thought, well, it isn't going to be an issue in
23 this case. The church's conduct will not be an issue
24 in the case. It will be a simple case on the conversion
25 torts and invasion of privacy torts, and Mr. Litt was
26 then asked to prepare the case.

27 We are totally unprepared, as Mr. Litt has
28 indicated, and we would have to at this point have independent

1 counsel represent the church and not continue having
2 Mr. Litt litigate the activities of the church when he
3 hasn't prepared it and we haven't prepared it, so I just
4 think that should be brought to the court's attention.

5 MS. DRAGOJEVIC: I'd like to clarify a few things
6 because I was present at all the hearings regarding motions
7 to strike the affirmative defense.

8 First of all, the defense was originally stricken
9 because the court felt we had too much material, too much
10 extraneous material in the affirmative defense that didn't
11 relate to the action and, of course, that was because
12 we had just entered into the action. We really didn't
13 know what the scope of the case was going to be, as your
14 Honor has indicated numerous times, the case has moved
15 very quickly.

16 At that time we just put in whatever we thought
17 might apply. The Judge indicated that he thought it was
18 too overbroad and struck it, but we did get leave to amend.
19 We amended, this time only putting in a line that said,
20 "Plaintiff is liable for unclean hands," something very
21 simple. It really didn't elaborate or go into anything.

22 We went into court. At that time the Judge
23 said, "Well, now, this time you haven't given me enough.
24 Last time you gave me too much. This time you haven't
25 given me enough, so I am going to strike it again."

26 At that time we had filed the same affirmative
27 defense to the complaint in intervention, and it was stricken,
28 I think, by you, your Honor, I think for the same reason

1 that it just didn't give enough.

2 All of the motions were granted with leave
3 to amend. We held off amending, so that we could kind
4 of put together what we wanted to say. We have always,
5 in every paper filed in front of the court, whether it
6 was on motions on the preliminary injunction, motions
7 to modify the preliminary injunction, motion for summary
8 judgment, whatever it was, we have always indicated that
9 we feel there is an unclean hands defense. It has always
10 been in our papers, and I think if the court looked through
11 the papers, the court would see that.

12 Plaintiff and intervenor have always been
13 on notice that that has been our position. When I went
14 in for the order shortening time, it was shortly before
15 trial. Commissioner Stoutt just felt that there wasn't
16 good cause for the order to shorten time. He didn't make
17 any remarks about whether the affirmative defense was
18 appropriate or not. His role there was simply to indicate
19 whether I had good cause for the shortened time order.

20 So, we didn't get a chance to have it heard
21 and I felt that since these types of things can be brought
22 even during trial that we could bring it up to the trial
23 court, which is what we have done, but they have always
24 been on notice that this is one of our defenses and it
25 hasn't been stricken for any substantive reason. It has
26 only been stricken for procedural problems in the past.

27 MR. FLYNN: I'd like to add one thing, if I could,
28 your Honor.

1 Mr. Armstrong had been deposed on five full
2 separate days in this case. His counsel, namely me, has
3 been deposed on two days. Miss Dragojevic has been deposed.
4 Mr. Bunch has been deposed.

5 We have been unable to depose Mr. Hubbard,
6 and we are the defendants in the action. Mary Sue Hubbard
7 was deposed for several hours, and if your Honor saw the
8 transcript, virtually every question we asked was objected
9 to.

10 We have been given almost no discovery and
11 having been involved in discovery extensively in the last
12 four years against the Church of Scientology, virtually
13 every avenue of discovery that one seeks, one gets the
14 First Amendment defense, every defense that can be interposed
15 under modern jurisprudence.

16 It is very difficult but more importantly
17 it is very costly to try to obtain discovery from either
18 the plaintiff or the intervenor. The intervenor was in
19 prison for a time and unavailable.

20 Mr. Armstrong, as the court knows, has no
21 money, so it has been almost impossible to get any discovery
22 from the other side.

23 On the other hand, they have had full discovery
24 from Mr. Armstrong, from his counsel and from every other
25 witness that they wish to depose, and they have pushed
26 this case forward as rapidly as possible.

27 So, for them to now come into court and claim
28 that they have been prejudiced in discovery is simply

1 inaccurate.

2 MR. LITT: Your Honor, there has not been a single
3 order in this case which has found that there was even
4 an improper objection to discovery. Mrs. Hubbard answered
5 virtually every question asked in her deposition. I told
6 Miss Dragojevic that she could reschedule the deposition.
7 She did not schedule a second day of deposition. She
8 was available.

9 The statements made concerning discovery in
10 this case are simply not supported and it is a typical
11 problem. There is nothing in the record to support these
12 claims made concerning how we have conducted ourselves
13 in discovery, and as to our awareness that they made certain
14 claims of what should be in the case, of course, we were
15 aware of that. We were also aware of the rulings that
16 the court had made and we were relying on the state of
17 the pleadings.

18 THE COURT: Well, I don't envision that my permitting
19 this on the equitable cause of action is going to open
20 the door to any evidence other than what we have already
21 talked about in this case. Technically it is something
22 that should be a part of it and I don't envision that
23 this goes to open the door to any new evidence that I
24 haven't already discussed and I would consider appropriate
25 to permit.

28-1

1 MR. PETERSON: What it has done, Your Honor, it has
2 opened up new evidence of 21 witnesses that we knew nothing
3 of. Miss Dragojevic said that 21 of the 50 witnesses on
4 her list never showed up in any of the discovery. So we
5 have no idea. We relied on the court's ruling that unclean
6 hands would not be a defense in this case.

7 You gave these defendants ample opportunity to
8 amend or seek to amend and correct the mere technicalities,
9 as they call it -- I call it a very substantive thing that
10 they didn't correct -- and they didn't. And here we are
11 on the eve of trial, and it is coming in; and the equitable
12 part of this case is equally important to us as any other
13 part of the case.

14 THE COURT: Certainly it is. I am not suggesting it
15 isn't. But the court is going to hear this evidence anyway,
16 so the court is going to have to make its own determination.
17 If it feels it is appropriate, it will deal with it, if it
18 considers it appropriate.

19 MR. PETERSON: It doesn't go to the court's ability to
20 hear it and react to it. It goes to our ability to prepare
21 and defend against it. We will walk in unarmed and unprepared
22 for whatever the defendants want to put before the court.
23 The court will take it, and we have not properly prepared
24 a defense. We are prejudiced. We are being put on trial.
25 We are the defendants under those circumstances.

26 MR. FLYNN: I can clear that up. Whatever we have
27 talked about so far that Your Honor has ruled upon is the
28 scope of the factual evidence that will be put in the record.

28-2

1 How that gets legally interpreted in terms of the unclear
2 hands doctrine, I submit to the court, is a technical matter.

3 But our evidence will be limited to basically
4 what we have talked about.

5 MR. LITT: I think, Your Honor, we understand the court's
6 ruling. I want to explain a problem that we have at this
7 point and make a suggestion to the court.

8 In the course of this two day hearing, as we
9 view it the court has defined the issues in this case in
10 a way that was substantially, as we understood it, beyond
11 the pleadings in the case. The only affirmative defense
12 that conceivably could relate to this that was in the case
13 throughout the case is the affirmative defense that the
14 defendant -- it is the seventh affirmative defense, that
15 the defendant had First Amendment rights to disclose this
16 information.

17 We at this point, having now heard the court's
18 rulings and having heard how the issues are defined, frankly
19 need the opportunity to consult with our clients on several
20 different issues that are implicated by the court's rulings
21 and to come back to the court and make a suggestion of how
22 we think they should be handled, at least as we see it.
23 Those include issues that Mr. Peterson raised with respect
24 to whether, from our point of view at this point, we want
25 to have separate counsel represent Mrs. Hubbard and the Church;
26 because some of the rulings that the court has made raise,
27 in my mind, trial tactics questions about whether it is
28 desirable to have joint counsel, which we didn't feel was

28-3
1 a problem as we viewed the permissible scope of the evidence
2 in the case based on the pleadings in the file.

3 Secondly, the ruling of permitting unclean hands
4 and, in general, the scope of allowing claims about misconduct
5 to become an affirmative defense in the case, we need to
6 discuss with the clients what the implications of that are,
7 what the implications are for the damages case, what the
8 implications are for the equitable relief case and what posture
9 we wish to take with respect to that.

10 The court has made rulings which we feel implicate
11 serious constitutional issues and whether we want to seek
12 any remedy at this point is an issue that needs to be
13 discussed.

14 What I am raising with the court is that now
15 that we have gone through this series of motions we need
16 basically to go into the beginning of the week for us to
17 be able to consult with our clients and come back to the
18 court and at least state what our position is with respect
19 to any of these matters and what effect it has on the trial,
20 as we view it; and if we have any motions that we wish to
21 make in regard to this, based upon the court's rulings, that
22 we have the opportunity to make them at that time.

23 So what I was going to suggest at this point
24 was that this matter -- both Miss Dragojevic and I have an
25 appearance in Federal District Court on Monday morning in
26 another Scientology case, same case, involving a summary
27 judgment motion on a First Amendment issue which has been
28 continued three times.

29

29- 1 So I would like to suggest to the court that
2 we do the following: we go over until either Monday afternoon
3 or Tuesday morning. We have a chance to confer with our
4 clients on all of these issues and see if we have any
5 requests to make of the court at that time.

6 Mr. Flynn and Miss Dragojevic prepare the
7 list of documents that they intend to introduce as we
8 discussed before so that we would know what documents
9 we are dealing with.

10 When we come in, one of our requests may be
11 based on some of the factors that I have talked about
12 before that the court require some kind of a specification
13 of proof or limitation of evidence just to define what
14 are the facts and issues in the case. I don't know. We
15 haven't had a chance to really go through all of this
16 in light of the full scope of all the court's rulings
17 and we see exactly where we are at this point. If we
18 have any requests to make of the court, that we would
19 make them at that time and also Mr. Flynn mentioned earlier
20 that he was considering a jury waiver. We would like
21 to know whether that is their position or not and if it
22 is their position, we have not had a chance to discuss
23 our position with respect to that with our clients either.
24 So essentially what I am saying at this point is that
25 now that we have completed going through the advance motions,
26 that we come in and have a discussion with the court and
27 we will be prepared at that time to set forth our position
28 on any of the issues that have been raised so far.

1 MR. FLYNN: Your Honor, I am not sure I understand
2 what is going on, but the position that they have with
3 regard to everything that has gone on so far has already
4 been set forth in probably 200 pages of briefs which have
5 been ruled upon, which also would suggest that they have
6 been thoroughly prepared for this case all along as is
7 obvious from the amount of paperwork. They knew that
8 these were the issues and they have extensively briefed
9 them and litigated them for a year and a half before this
10 court.

11 With regard to bringing another counsel in
12 at this point, we waived our motion, which they objected
13 to, to have separate counsel because we believe, even
14 though we have waived it, that there is a conflict. But
15 they chose to go forward with one counsel.

16 If all we are talking about is the amount
17 of time between now and Monday afternoon, even though
18 I have been out here for two weeks so far and we really
19 haven't heard any evidence, I really have no objection
20 to that. If, however, the suggestion is that they are
21 now going to file more motions to re-review everything
22 that's already occurred, which is kind of what the suggestion
23 was because Mr. Litt indicated that he wanted to find
24 out from his client what their position will be. Well,
25 the position is already established as to what the framework
26 of the case is, then I would object to more motions on
27 something we have already argued about.

28 On the jury waiver issue, basically our position

1 is this: We think that if the case was litigated in front
2 of the jury and all of the issues that legitimately have
3 to be put forward for Mr. Armstrong, we would be here
4 a lot longer because of side-bar conferences,
5 voir dire hearings and similar efforts to try to sanitize
6 or constrain the evidence.

7 For that reason -- your Honor is probably
8 now more familiar with this case than any other judge
9 has ever been, and your Honor is probably the only judge
10 who has read everything.

11 We think that at this point we are prepared
12 to waive our jury claim.

13 Mr. Litt, on behalf of the intervenor, and
14 Mr. Peterson on behalf of the church did not file any
15 jury claims in the action. Exactly what posture that
16 leaves them in, I am not precisely clear. Whether they
17 could pick up the jury claim is some question that I have,
18 but in any event, we are prepared to waive it because
19 we believe, as I said from the very first moment in chambers
20 and the very beginning of my argument, what this case
21 is about is what is in the documents and how they should
22 be preserved. That is what the case is about.

23 Most of these other claims are just basically
24 fluff to try to affect outcome. That is really at the
25 heart of this lawsuit. For that reason we think that
26 a jury-waived trial would be appropriate.

27 Whether or not that is going to require more
28 than one afternoon to change the posture of the case

1 as far as the intervenor and the plaintiff see it is something
2 that does bother me to some degree. If they come in and
3 claim that well, now, because we are waiving the jury,
4 they are going to need another week or two to try to prepare
5 the case, then I would have severe objections to that.

6 If the state of the record today is going
7 to be left that we are going to adjourn until Monday afternoon
8 and we are going to come back in and we are going to proceed
9 with the jury-waived trial, then I have no objection to
10 this, apparently it is a request for continuance and I
11 have no objection.

12 But if it is an effort to buy several weeks
13 of time, then I specifically bring up the following point
14 which I'd like to put on the record at this time. If
15 they are going to claim that what they have got to do
16 is acquaint and educate new counsel and they are going
17 to need weeks of preparation to do so, then I have a strenuous
18 objection to that, if that is what is being done because
19 that, I will submit to the court, is what has been done
20 on almost every Scientology case once it gets to trial
21 across the country. As soon as the case comes to trial,
22 new counsel appear. Old counsel go out and continuances
23 are requested. That has almost uniformly occurred, and
24 if that is what is going to happen next Monday afternoon,
25 then I strenuously object.

26 MR. PETERSON: First of all, your Honor, there has
27 been no other Scientology case come to trial. There has
28 been no case across this country where at the last minute

1 during trial an attorney has been substituted in. Mr. Flynn
2 is painting this parade of horrors. We are not, and I
3 will repeat, we are not going to ask for any extension
4 of time based on the fact that we have to bring in new
5 counsel and reacquaint that counsel with the trial.

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1 That will not be our request. We didn't ask
2 for it, and we will not ask for it.

3 THE COURT: This has nothing to do here, but obviously
4 we are not going to start the trial this afternoon, and Monday
5 is just a few days away, so it is no big deal.

6 If you have got to be in Federal Court, we in
7 the state system here are stuck with the fact that the Federal
8 Court doesn't recognize we exist, so --

9 MR. PETERSON: If I may interrupt a second. I was
10 not sure. I mean it sounded to me like Mr. Flynn was waiving
11 the jury; but as we indicated, if he in fact is waiving the
12 jury, I would like that to be made clear so that I may go
13 back to my clients, inform them of the ramifications of
14 requesting a jury.

15 I am not sure the court would grant us the
16 opportunity at this time to have a jury if we requested it.

17 THE COURT: Counsel, if either side wants a jury trial
18 and they want to pay for it, they can have a jury trial.

19 MR. PETERSON: I have to explain that to my clients
20 if, in fact, he has waived it.

21 THE COURT: The only way we can deny a jury trial is
22 if you have no jurors. We have jurors by the score, by the
23 bushel.

24 MR. PETERSON: Has there been a waiver?

25 THE COURT: I took it as an offer to be a waiver.

26 MR. FLYNN: It is a waiver, Your Honor.

27 MR. LITT: I didn't expect that we were going to go
28 any further today. I just wanted to indicate to the court

30-2

1 that we are not making any requests at this point. We just
2 feel we need to have a conference with the clients. We may
3 have requests that relate to petitioning for a writ. We
4 haven't made any determination of that. They may relate
5 to whether or not we have had an adequate opportunity to
6 prepare. They may relate to several things. I just wanted
7 to give the court an idea of what the concerns were for us,
8 not make any requests at this point, and say that we would
9 raise whatever we have to raise on Monday afternoon.

10 THE COURT: Okay. What time will you be through over
11 at the Federales?

12 MR. LITT: If we get through in the morning, we should
13 be through by 12:00 or 12:30. Normally the law and motions
14 calendar on civil matters is heard Monday mornings and
15 theoretically finished Monday mornings. It is not always
16 finished, in fact, Monday morning. Judge Marshall has
17 continued this particular motion three times. It is
18 substantive. I don't have any information on this. It is
19 possible --

20 THE COURT: You tell her that her former colleague,
21 Judge Breckenridge, would like to have you at 1:30.

22 MR. LITT: I will certainly pass it on, Your Honor.

23 THE COURT: I guess we have run out of steam here today.

24 There was a motion to amend an answer. I will
25 allow the amendment as it goes to the equitable causes of
26 action only, not to the legal causes of action. The basic
27 reason is that I feel that there is nothing new as far as
28 facts are concerned, having been discussed between the parties

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1 for a year and a half the case has been pending. Apparently
2 Armstrong has been deposed numerous times and his story has
3 been told, I have to assume, and that there is nothing new
4 that has been stated. Maybe the inflection is different,
5 maybe the emphasis is a little different; but I assume the
6 story has been reasonably consistent during this period of
7 time.

8 It seems to me that when you are applying a legal
9 tag to some facts it is the facts which are important, at
10 least insofar as the discovery phase is concerned; and the
11 parties should be prepared to anticipate the facts may give
12 rise to different legal concepts and they should be prepared
13 on legal concepts rather quickly. I don't think that it
14 is the facts that create problems.

15 It seems to me reasonably I can conclude that
16 all of Mr. Armstrong's contentions, the version of what
17 occurred, has been dealt with rather thoroughly in these
18 depositions.

19 Insofar as the plaintiff has moved to expedite
20 the case and the court has attempted to accommodate the
21 plaintiff, and we have been here yesterday and today and
22 then there were two days the court spent reading all these
23 documents after you came here Monday some time -- so there
24 has been a week of the court's time already devoted to this
25 case -- my disposition, of course, is that the case should
26 move forward.

27 On the other hand, I am not going to prejudge
28 any motions that you might submit which you, after consulting

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1 with your clients, feel are appropriate in the interests
2 of your clients. After all, that is what a lawyer's job
3 is, to deal with situations as they arise and bring proper
4 matters to the court.

5 So with that I guess we will just trail the matter,
6 then, till Monday, hopefully at 1:30.

7 MR. LITT: Thank you, Your Honor.

8 MISS DRAGOJEVIC: Thank you, Your Honor.

9 MR. FLYNN: Thank you.

10 (At 2:10 p.m., an adjournment was taken
11 until Monday, April 23, 1984, at
12 1:30 p.m.)
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